

VOL I
TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

No. 129

**OSAKA SHOSSEN KAISHA AND UNITED STATES FIDELITY
& GUARANTY COMPANY, PETITIONERS**

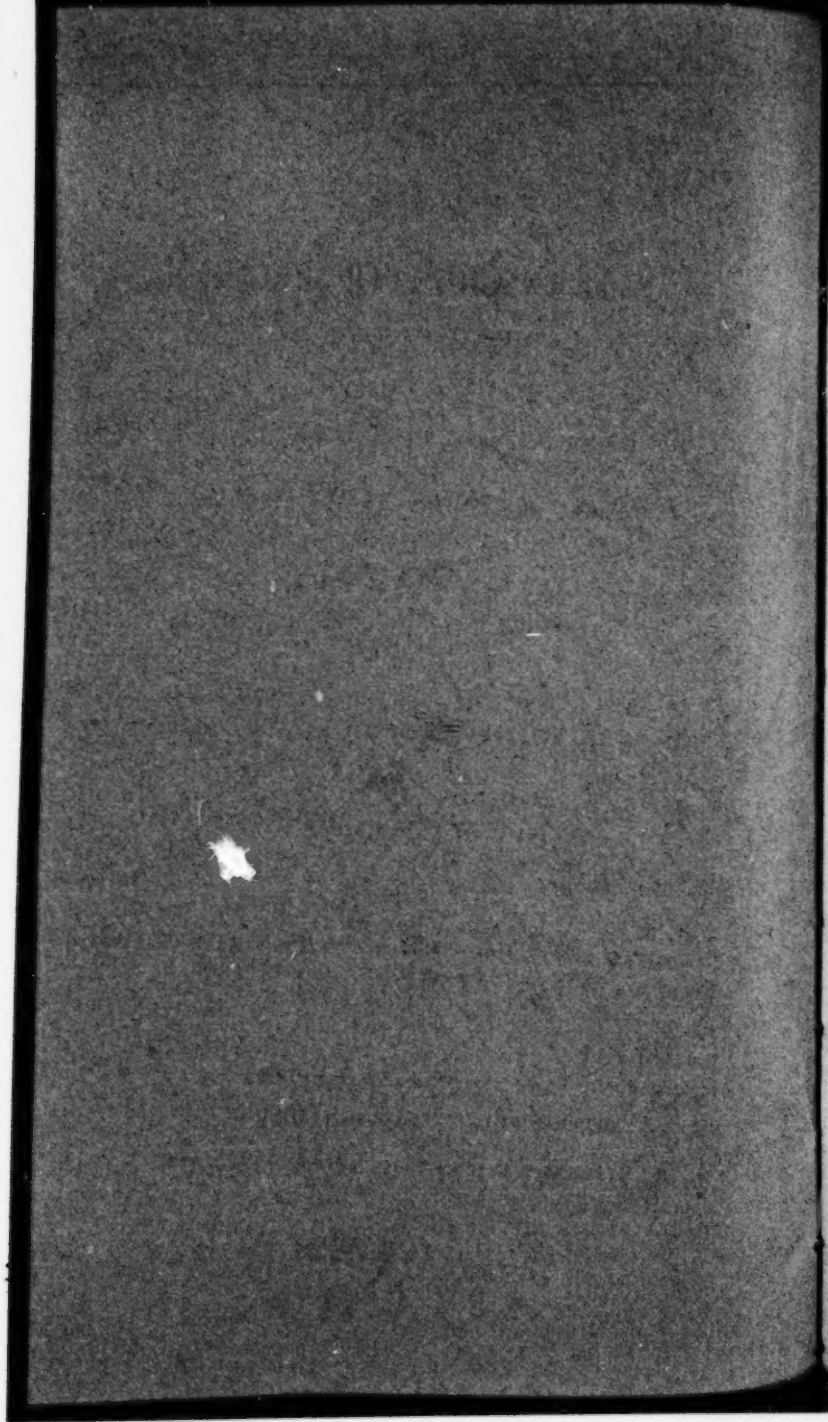
PACIFIC EXPORT LUMBER COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT**

PETITION FOR CERTIORARI FILED OCT. 24, 1922.

CERTIORARI AND RETURN FILED NOVEMBER 14, 1922.

(38,361)



(28,382)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 427.

OSAKA SHOSEN KAISHA AND UNITED STATES FIDELITY
& GUARANTY COMPANY, PETITIONERS,

vs.

PACIFIC EXPORT LUMBER COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

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IN THE
District Court of the United States
For the District of Oregon
In Admiralty
No. 7467

STATEMENT.

Time of Commencement of Suit, June 4, 1917.

Names of Parties:

PACIFIC-EXPORT LUMBER COMPANY, a
corporation of the State of Oregon, *Libelant.*

OSAKA SHOSEN KAISHA, a Japanese cor-
poration, *Claimant.*

UNITED STATES FIDELITY & GUARANTY
COMPANY, a corporation, Surety on Claim-
ant's stipulations for costs and to abide the
decree.

Date when pleadings were filed:

Libel June 4, 1917

Claimant's Exceptions to Libel...June 29, 1917

Claimant's Amended Exceptions to Libel

.....July 2, 1917

Claimant's Answer to Libel.....Sept. 27, 1917

Amended Libel.....Oct. 13, 1919

Claimant's Exceptions to Amended Libel

.....Oct. 28, 1919

Claimant's Answer to Amended Libel..Dec. 1, 1919

At the time of filing its libel, libelant filed a stipulation for costs in the principal sum of \$250.00 with National Surety Company as surety.

No process was issued and no property was attached or arrested; but, on the 4th day of June, 1917, after the filing of the libel, the above named Osaka Shosen Kaisha filed a claim for the "Saigon Maru," the vessel named in the libel, as the owner thereof, and also a stipulation for costs in the sum of \$250, and a stipulation to abide the decree in the sum of \$30,000, both executed by said Osaka Shosen Kaisha as principal and said United States Fidelity & Guaranty Company, as surety. The amount of the latter stipulation was by order of the above entitled court entered on the 13th day of October, 1919, reduced to \$15,000.

On September 17th, 1917, the court filed its opinion on claimant's amended exceptions to the libel, holding that said exceptions should be overruled and on said day made an order overruling said exceptions and each of them.

On December 1, 1919, the Court made an order overruling claimant's exceptions to the amended libel without prejudice to the right of claimant to present at the final hearing the questions raised by said exceptions.

On the 12th day of December, 1919, said cause came on for trial by the court upon the pleadings and evidence before the Honorable Charles E. Wolverton, United States District Judge for the District of Oregon. The trial was resumed on December 13th

and was continued from said date for further trial to December 15th and on said date came on for further trial, and said trial continued from day to day until December 19th, 1919. The case was on said day continued for argument until March 16, 1920, but was not argued orally, having been thereafter submitted on written arguments.

No question was referred to any Commissioner.

On August 16, 1920, the Court filed its opinion on the merits holding that libelant was entitled to recover damages and costs and directed judgment accordingly.

On October 4, 1920, at 2:30 P. M., Claimant filed exceptions to said opinion and to the findings and holdings therein contained. These exceptions were at said time overruled by the court and exceptions taken by claimant to the court's rulings in that regard.

On the 4th day of October, 1920, at 2:40 P. M., a decree was entered by said court ordering, adjudging and decreeing that libelant have and recover for the causes mentioned in its amended libel herein, the sum of \$2453.65, with interest thereon at the rate of six per cent (6%) per annum, from August 2, 1917, for and on account of loss of profits suffered by libelant and the further sum of \$5192.86 for and on account of the claim for damages against libelant by Gillanders, Arbuthnot & Company, together with interest thereon at six per cent (6%) per annum from August 2, 1917, and its costs and disbursements, and that the Osaka Shosen Kaisha, the above named

claimant, and the above named United States Fidelity & Guaranty Company, as stipulator for costs and to abide the decree on the part of said claimant, cause the engagements of their stipulations to be performed, or show cause within ten days after notice of the entry of said decree why execution should not issue forthwith against their goods, chattels and lands in satisfaction thereof.

On the 25th day of October, 1920, libelant filed a motion for summary judgment against the stipulators supported by the affidavit of M. M. Matthiessen, of service of said decree of October 4th, 1920, more than ten days prior to the filing of said motion.

On the 25th day of October, 1920, a summary judgment was entered against said Osaka Shosen Kaisha and said United States Fidelity & Guaranty Company, and each of them, in the sum of \$2453.65, and the further sum of \$5192.86 together with interest on said sums at the rate of 6 per cent per annum from August 2, 1917, and for costs and disbursements, and that libelant have execution thereon to satisfy said decree.

On October 27, 1920, notice by claimant to libelant of the entry of said decree of October 4th, 1920, and of said summary judgment of October 25, 1920, together with acceptance of service thereof, was filed.

NOTICE OF APPEAL by said Osaka Shosen Kaisha and said United States Fidelity & Guaranty Company, together with acceptance of service thereof, was filed on October 27, 1920.

On October 27, 1920, an order was made and filed fixing the amount of bond on appeal at \$11,000.00, the same to operate as the \$250 cost bond on appeal and as a supersedeas bond staying execution.

On October 27, 1920, an appeal bond in the principal sum of \$11,000 executed by said appellants as principals and the Aetna Indemnity & Surety Company as surety was filed and approved.

On October 27, 1920, notice by appellants to appellee of the filing of said bond, with acceptance of service of said notice, was filed.

On October 27, 1920, appellants' assignments of error, with acceptance of service thereof, were filed.

On October 27, 1920, the citation on appeal was signed by the District Judge and served and filed.

On October 27, 1920, stipulation and order as to record was filed.

*In the District Court of the United States for the
District of Oregon.*

March Term, 1917

Be it remembered, that on the 4th day of June, 1917,
there was duly filed in the District Court of the
United States for the District of Oregon, a Libel
in Rem, in words and figures as follows, to wit:

LIBEL IN REM.

*In the District Court of the United States for the
District of Oregon.*

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.,

PACIFIC EXPORT LUMBER COMPANY, a cor-
poration, Libelant.

**TO THE HONORABLE CHARLES E. WOLVERTON AND THE
HONORABLE ROBERT S. BEAN, JUDGES OF THE
UNITED STATES DISTRICT COURT FOR THE DIS-
TRICT OF OREGON, IN ADMIRALTY SITTING:**

The libelant, Pacific Export Lumber Company, a
corporation organized and existing under the laws
of the State of Oregon, brings this its libel against
the Japanese steamer Saigon Maru, her tackle, etc.,
and against all persons intervening for their inter-
est in the same, in a cause of contract, civil and mar-
itime, and alleges as follows:

I.

That the libelant is a corporation duly organized

and existing under the laws of the State of Oregon and qualified to do business therein.

II.

That on or about the 19th day of March, 1917, the libelant and the owners of said steamer, Osaka Shosen Kaisha, entered into a charter party whereby libelant chartered said steamer from her said owners to carry a full cargo of lumber and (or) timber, including a full deck-load, from a port on the Columbia or Willamette River to Bombay, India. Her said owners agreed with this libelant on the freighting and chartering of the whole of said vessel, including the deck (with the exception of the cabin and necessary room for the crew, and the stowage of provisions, bunker coals, sails and cables) or sufficient room for the cargo in said charter party mentioned.

III.

Pursuant to said charter party said steamer came to Portland, Oregon, and there took on a portion of the cargo which libelant had prepared for shipment upon her, and she is now lying in the Willamette River with a portion of said cargo on board her, but her master refuses to take on board the whole of said cargo and refuses to carry a full deck-load of said cargo, as provided in the charter party. Said vessel can safely carry on deck not less than, to wit, eight hundred thousand feet of the sawn lumber and (or) timber comprising said cargo, but her

master has taken on deck only two hundred and thirty-eight thousand two hundred and eighty-three (238,283) feet, and has refused and still refuses to take any more.

IV.

That by reason of said refusal and said failure of said vessel to carry a full deck-load as agreed in said charter party, the libelant is damaged in a large sum, the exact amount of which it is not possible at this date to determine, but as closely as libelant can estimate, said damages amount to Fifteen Thousand Dollars (\$15,000.00), and may exceed that sum, and libelant reserves the right to show other and additional damage as it may arise.

V.

That said steamer is now in the Willamette River, in the harbor at Portland, Oregon, and is within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

VI.

That all and singular the premises are true.

Wherefore, libelant prays that process in due form, according to the practice of this court in cases of admiralty and maritime jurisdiction, may issue against said steamer, her tackle, apparel, etc., and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this Honorable Court

may be pleased to decree the payment of the damages aforesaid, with costs, and that the said vessel may be condemned and sold to pay the same, and that the libelant may have such other and further relief in the premises as in law and justice it may be entitled to receive.

ERSKINE WOOD,
Proctor for Libelant.

UNITED STATES OF AMERICA, }
District of Oregon. } ss.

I, W. D. Wheelwright, being first duly sworn, say that I am the president of the libelant herein; that I have read the foregoing libel, and the statements therein made are true.

W. D. WHEELWRIGHT.

Subscribed and sworn to before me, this 4th day of June, 1917.

[Notarial Seal]

A. MATTHEW,

Notary Public in and for Oregon.

My commission expires March 1, 1921.

Filed June 4, 1917. G. H. Marsh, Clerk.

shall be awarded against it by this court, or in case of appeal, by the appellate court.

OSAKA SHOSEN KAISHA,

By Edwin Orrett, Local Manager.

UNITED STATES FIDELITY AND GUARANTY
COMPANY,

By Douglas R. Tate, Its Attorney-in-fact.

[Seal of Surety Co.]

Filed June 4, 1917. G. H. Marsh, Clerk.

And afterwards, to wit, on the 4th day of June, 1917,
there was duly filed in said Court, Claimant's
Stipulation to abide by and pay decree, in words
and figures as follows, to wit:

*In the District Court of the United States for the
District of Oregon.*

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.

PACIFIC EXPORT LUMBER COMPANY, a cor-
poration,

Libelant.

OSAKA SHOSEN KAISHA,

Claimant.

Whereas, a libel was filed in this court on June
4, 1917, by Pacific Export Lumber Company, against
the Japanese Steamer "Saigon Maru", her tackle,
apparel and furniture, for the reasons and causes in
said libel mentioned, and praying that the same may

be condemned and sold, to answer the prayer of said libellant; and a claim has been filed by Osaka Shosen Kaisha; and the said claimant and United States Fidelity and Guaranty Company, surety, the parties hereto, hereby consenting and agreeing, that in case of default or contumacy on the part of the claimant or its surety, execution may issue against their goods, chattels and lands, for the sum of Thirty Thousand Dollars (\$30,000).

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and are bound in the sum of Thirty Thousand Dollars, conditioned that the claimant above named shall abide by and pay the money awarded by the final decree rendered in the cause by this Court, or in case of appeal, by the Appellate Court.

OSAKA SHOSEN KAISHA,

By Edwin Orrett, Local Manager.

UNITED STATES FIDELITY AND GUARANTY
COMPANY,

By Douglas R. Tate, Its Attorney-in-fact.

[Seal of Surety Co.]

Taken and acknowledged before me this 4th day
of June, 1917.

[Notarial Seal]

G. M. SHROCK,

Notary Public for Oregon.

My commission expires October 31, 1920.

Examined and approved this 4th day of June,
1917.

CHAS. E. WOLVERTON, Judge.

Filed June 4, 1917. G. H. Marsh, Clerk.

And afterwards, to wit, on the 29th day of June,
1917, there was duly filed in said Court, Claim-
ant's Exceptions to Libel, in words and figures as
follows, to wit:

EXCEPTIONS TO LIBEL.

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a cor-
poration,

Libelant,

vs.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.

Respondent.

OSAKA SHOSEN KAISHA, a corporation organ-
ized and existing under the laws of Japan,

Claimant.

TO THE HONORABLE CHARLES E. WOLVERTON AND THE
HONORABLE ROBERT S. BEAN, JUDGES OF THE DIS-
TRICT COURT OF THE UNITED STATES FOR THE DIS-
TRICT OF OREGON, IN ADMIRALTY SITTING:

Comes now the above named claimant, Osaka
Shosen Kaisha, a corporation, and objects and ex-
cepts to the libel of the above named libelant, Paci-
fic Export Lumber Company, a corporation, and for
cause of exception, alleges:

I.

That said libel shows that this cause is not a
cause of admiralty or maritime jurisdiction, and
that this court sitting in admiralty has no jurisdic-
tion to hear or determine the same.

II.

That the subject matter of said action is without
the jurisdiction of this court.

III.

That the said libel shows that libelant has, and
at the commencement of this suit had, no cause of
action against or lien upon the said steamship "Sai-
gon Maru", and fails to show that libelant has or
had at the time of the commencement of this suit any
cause of action against or lien upon the said steam-
ship "Saigon Maru".

IV.

That said libel shows that it is based upon the
alleged non performance by claimant of an execu-

tory contract of affreightment, and that the said vessel "Saigon Maru" is a Japanese vessel and not a vessel of the United States or a domestic vessel of the State of Oregon, and that no part of the lumber or timber, which libelant alleges said vessel refused to carry, was ever placed in or upon said vessel, and that libelant has, and at the time of the commencement of this suit had, no lien upon or claim against said vessel, either under the general maritime law, or the laws of the United States, or under the laws of the State of Oregon.

V.

That said libel fails to state facts sufficient to constitute a cause of action against said vessel, or to show that libelant has any lien against the same, either under the general maritime law, or the laws of the United States, or the laws of the State of Oregon.

VI.

And this claimant, not waiving its said objections and exceptions but still insisting on the same, objects and excepts to Article IV of said libel for that the same is too indefinite, uncertain and general to be answered by claimant, or to apprise claimant of the nature or basis of the claim for damages therein alleged, in that the same fails to state how, in what manner, and in what particulars libelant has or will suffer the damages therein claimed.

VII.

And all of which particulars in said libel are insufficient and therefore said claimant is not bound to answer same and prays that said libel be dismissed.

Dated this 28th day of June, 1917.

FRANK A. HUFFER,
and
HUFFER & HAYDEN,
Proctors for Claimant.

UNITED STATES OF AMERICA, } ss.
District of Oregon.

I, Frank A. Huffer, one of the proctors of this Court and of the above named Claimant, do hereby certify that in my opinion the foregoing exceptions and each of them are well founded in point of law.

Dated this 28th day of June, 1917.

FRANK A. HUFFER,
Of Proctors for Claimant.

Filed June 29, 1917. G. H. Marsh, Clerk.

And afterwards, to wit, on the 2nd day of July, 1917, there was duly filed in said Court, Claimant's Amended Exceptions to Libel, in words and figures as follows, to wit:

AMENDED EXCEPTIONS TO LIBEL.

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libelant,

vs.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.

Respondent.

OSAKA SHOSEN KAISHA, a corporation organized and existing under the laws of Japan,

Claimant.

TO THE HONORABLE CHARLES E. WOLVERTON AND THE
HONORABLE ROBERT S. BEAN, JUDGES OF THE DISTRICT
COURT OF THE UNITED STATES FOR THE DISTRICT
OF OREGON, IN ADMIRALTY SITTING:

Comes now the above named claimant, Osaka Shosen Kaisha, a corporation, and files these its amended exceptions to the libel of the above named libelant, Pacific Export Lumber Company, a corporation, and objects and excepts to said libel, and for cause of exception, alleges:

I.

That said libel shows that this cause is not a cause of admiralty or maritime jurisdiction, and

that this court sitting in admiralty has no jurisdiction to hear or determine the same.

II.

That said libel fails to show that this is a cause of admiralty or maritime jurisdiction, or that this court sitting in admiralty has jurisdiction to hear or determine the same.

III.

That the subject matter of this action is without the jurisdiction of this court.

IV.

That said libel fails to show that this court has, or at the time of the commencement of this suit had, any jurisdiction of said steamship "Saigon Maru".

V.

That said libel shows that at the time of the commencement of this suit this court did not have, and that it does not now have, jurisdiction of said steamship "Saigon Maru".

VI.

That said libel fails to state facts sufficient to show any power, authority or jurisdiction to arrest said vessel by reason of the matters and things, or any of them, alleged in said libel, or by reason of any other matter or thing.

VII.

That it appears in and by said libel that the arrest and seizure of said vessel herein was unlawful and unauthorized.

VIII.

That said libel shows that it is based upon the alleged non-performance by claimant of an executory contract of affreightment, and that at the time of the commencement of this suit and the arrest of said vessel, said "Saigon Maru" was a Japanese vessel and not a vessel of the United States, or a domestic vessel of the State of Oregon, and that no part of the lumber or timber, which libelant alleges said vessel refused to carry, was ever placed in or upon said vessel, and, therefore, that libelant has, and at the time of the commencement of the suit, had no lien upon or claim or cause of action against said vessel which is within the admiralty or maritime jurisdiction of this court, or which this court, sitting in admiralty, has any power to hear, adjudicate or determine.

IX.

That said libel shows it is based upon the alleged non-performance by claimant of an executory contract of affreightment, and fails to show that the said vessel "Saigon Maru" was at any of the times mentioned in said libel a domestic vessel of the State of Oregon, or that any part of the lumber or timber,

which, libelant alleges, said vessel refused to carry was ever placed in or upon said vessel, and therefore fails to show that at the time of the commencement of this suit, or at the time of the arrest of said vessel, libelant had, or now has, any lien upon or claim or cause of action against said vessel which is within the admiralty and maritime jurisdiction of this court, or which this court, sitting in admiralty, has any power to hear, adjudicate or determine.

X.

That said libel fails to state facts sufficient to show any right on the part of libelant to proceed in rem against said vessel, or to cause the arrest thereof, or to state any cause of action in rem against the same.

XI.

That said libel fails to state facts sufficient to show any jurisdiction of said vessel by this court, or any power of this court to make any adjudication with reference thereto, but on the contrary shows that this court has no such power of jurisdiction.

XII.

That said libel fails to state facts sufficient to show that libelant has, or at the time of the commencement of this suit, or the arrest of said vessel had, any lien upon or claim against said vessel cognizable by this court as a court of admiralty and maritime jurisdiction.

XIII.

That it appears in and by said libel that whatever cause of action, if any, libelant may have is one in personam and not in rem.

And claimant, not waiving any of its said objections or exceptions, but still insisting upon the same and each of them, makes and files the following objections and exceptions which it asks to have sustained in the event claimant's objections herein to the jurisdiction are overruled.

XIV.

That said libel fails to state facts sufficient to constitute a cause of action against said vessel or to show that libelant has, or at the time of the commencement of this suit had any lien upon or claim against the same, either under the general maritime law or the laws of the United States, or the laws of the State of Oregon, but, on the contrary, shows that it has not now, nor at the time of the commencement of this suit or at any time had any such lien or claim.

XV.

That said libel shows that it is based upon the alleged non-performance by claimant of an executory contract of affreightment, and that at the time of the commencement of this suit and the arrest of said vessel, said "Saigon Maru" was a Japanese vessel and not a vessel of the United States, or a domestic

vessel of the State of Oregon, and that no part of the lumber or timber which libelant alleges said vessel refused to carry was ever placed in or upon said vessel, and therefore that libelant has, and at the time of the commencement of the suit had, no lien upon or claim or cause of action against said vessel, either under the general maritime law or the laws of the United States, or the laws of the State of Oregon.

XVI.

That said libel shows it is based upon the alleged non-performance by claimant of an executory contract of affreightment, and fails to show that the said vessel "Saigon Maru" was at any of the times mentioned in said libel a domestic vessel of the State of Oregon, or that any part of the lumber or timber, which libelant alleges said vessel refused to carry, was ever placed in or upon said vessel, and therefore fails to show that at the time of the commencement of this suit, or at the time of the arrest of said vessel, libelant had, or now has, any lien upon or claim or cause of action against said vessel, either under the general maritime law, or the laws of the United States, or the laws of the State of Oregon.

XVII.

Claimant objects and excepts to Article IV of said libel for that the same is too indefinite, uncertain and general to be answered by claimant, or to apprise claimant of the nature or basis of the claim

for damages therein alleged, in that the same fails to state how, in what manner, and in what particulars libelant has, or will suffer the damages therein claimed.

In all of which particulars the said libel is insufficient, and therefore the said claimant is not bound to answer the same, and it prays that the said libel may be dismissed with costs.

Dated this 2d day of July, 1917.

FRANK A. HUFFER,
HUFFER & HAYDEN,
Proctors for Claimant.

UNITED STATES OF AMERICA, } ss.
District of Oregon.

I, Frank A. Huffer, one of the proctors of this Court and of the above named claimant, do hereby certify that in my opinion the foregoing amended exceptions and each of them are well founded in point of law.

Dated this 2d day of July, 1917.

FRANK A. HUFFER,
Of Proctors for Claimant.

Filed July 2, 1917. G. H. Marsh, Clerk.

*In the District Court of the United States for the
District of Oregon.*

Be it remembered, that on the 17th day of September, 1917, there was duly filed in the District Court of the United States for the District of Oregon, Opinion of Hon. Chas. E. Wolverton, United States District Judge, overruling claimant's amended exceptions to libel, in words and figures as follows, to wit:

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, furniture, etc.

PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libelant.

OSAKA SHOSEN KAISHA, a corporation,

Claimant.

Wood, Montague, Hunt & Cookingham for Libelant.
Huffer & Hayden, Tacoma, for Claimant.

WOLVERTON, District Judge:

The question here presented for decision is whether the steamer Saigon Maru is subject to libel in rem for breach of a contract of affreightment in receiving on board part only of a cargo of lumber

agreed to be carried and refusing to carry the remainder.

It is unquestioned that, since the cases of *The Freeman*, 18 How. 182, and *The Yankee Blade*, 19 How. 82, were decided by the Supreme Court, it has been regarded as settled law that a libel in rem will not lie for the breach of an executory contract while the same remains wholly unperformed. Since the decision of those cases, however, the courts have, with rare exceptions, enforced liability in rem where there has been performance in part by the ship, such as in the present case, in taking and receiving on board part of the cargo engaged to be carried, or in doing any other act evidentiary of the fact of entering upon the discharge of the contractual engagement. The subject has received such lucid and persuasive consideration at the hands of Brown, District Judge, afterwards a Justice of the Supreme Court, as practically to set it at rest. *Scott vs. The Ira Chaffee*, 2 Fed. 401. The facts of this case were such as to show a non-performance in any particular, and the libel was dismissed.

But the subject in hand was fully treated of, and many cases since then, and some even previously, have sustained the libel where it was made to appear that the ship had entered in some way upon the discharge of its engagement to carry. See *The Hermitage*, 12 Fed. Cas. 6410; *The Williams*, 29 Fed. Cas. 17710; *The Director*, 26 Fed. 708; *The Starlight*, 42 Fed. 167; *The Oscoda*, 66 Fed. 347; *The Helios*,

108 Fed. 279; *The Oceano*, 148 Fed. 131; *Wilson vs. Peninsular Bark & Lumber Co.*, 188 Fed. 52.

The damages claimed are as definite as reasonably to be expected under the showing made by the libel.

Exceptions overruled.

Filed Sept. 17, 1917. G. H. Marsh, Clerk, by K. F. Frazier, Deputy.

And afterwards, to wit: on Monday, the 17th day of September, 1917, the same being the 66th Judicial day of the Regular July Term of said Court; present the Honorable Chas. E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

In the District Court of the United States for the District of Oregon.

No. 7647.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, furniture, etc.

PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libelant.

OSAKA SHOSEN KAISHA, a corporation,

Claimant.

On the 30th day of July, 1917, this cause came on regularly for hearing upon the exceptions of the

claimant, Osaka Shosen Kaisha, to the libel of the libelant herein, claimant appearing by Huffer & Hayden, its proctors, and the libelant appearing by Mr. Erskine Wood, its proctor, and the court after having heard the argument of counsel took the matter of said exceptions under advisement, and now being fully advised in the premises,

IT IS ORDERED, that said exceptions be and they and each of them are in all respects overruled, to which ruling and each and every part thereof said claimant excepts and its exceptions are allowed.

IT IS FURTHER ORDERED, that claimant be and its is hereby allowed until October 1st, 1917, to answer the libel herein.

Dated this 17th day of September, 1917.

CHAS. E. WOLVERTON,
U. S. District Judge.

Filed September 17, 1917. G. H. Marsh, Clerk.

And afterwards, to wit, on the 27th day of September, 1917, there was duly filed in said Court, Claimant's Answer to Libel, in words and figures as follows, to wit:

*In the District Court of the United State for the
District of Oregon.*

No. 7467.

CLAIMANT'S ANSWER TO LIBEL.

PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libelant,

vs.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.

Respondent.

OSAKA SHOSEN KAISHA, a corporation organized under the laws of Japan,

Claimant.

TO THE HONORABLE CHARLES E. WOLVERTON AND THE
TRICT COURT OF THE UNITED STATES FOR THE DIS-
HONORABLE ROBERT S. BEAN, JUDGES OF THE DIS-
TRICT OF OREGON, IN ADMIRALTY SITTING:

Now comes the Osaka Shosen Kaisha, a corporation organized and existing under and by virtue of the laws of Japan, with its principal place of business at the City of Osaka in said country, owner and claimant of the above named Japanese steamer, "Saigon Maru", her tackle, apparel, etc., and not waiving its objections to the jurisdiction of the court nor any other of the exceptions or objections contained in its amended exceptions to the libel herein, but still insisting on said objections and exceptions and each

of them, for answer to the libel and complaint of Pacific Export Lumber Company, a corporation, in an alleged cause of contract, civil and maritime, admits, denies and alleges as follows:

I.

In answer to Article I of said libel claimant is not advised as to whether the said libelant is a corporation duly organized or existing under the laws of the State of Oregon or qualified to do business therein, and for that reason denies each and every of the allegations in that behalf, and demands strict proof of the same, and each of them, if they be pertinent.

II.

In answer to Article II of said libel claimant admits that on or about the 19th day of March, 1917, the libelant and this claimant, Osaka Shosen Kaisha, being then the owner of said steamer "Saigon Maru", entered into a charter party, whereby said claimant agreed with said libelant on the freighting and chartering of the whole of said vessel, including the deck (with the exception of the cabin, necessary room for the crew, and the stowage of provisions, bunker coals, sails and cables), or sufficient room for the cargo in said charter party mentioned, for a voyage from a port on the Columbia or Willamette Rivers to Bombay, India, and whereby said libelant engaged to furnish to said vessel, at the designated loading place or places, as therein provided, a full

cargo of sawn lumber and (or) timber of such length and sizes as could be taken through said vessel's hatchways and (or) bow and (or) stern ports, if any, and on deck; denies that in or by said charter party it is provided that said vessel was to carry a full deck load of the cargo therein mentioned; and this claimant denies each and every allegation contained in said Article II not herein expressly admitted.

III.

In answer to Article III of said libel this claimant admits that pursuant to said charter party said steamer came to Portland, Oregon, and took on a full cargo of the kind mentioned in said charter party, and that she was at the time of filing said libel lying in the Willamette River, but this claimant denies that libelant had prepared for shipment upon said vessel any cargo other than or additional to said cargo already aboard her or that said vessel took on only a portion of the cargo which libelant had prepared for shipment upon her, and, in this connection, claimant avers that at the time of the filing of said libel and the commencement of this suit, said vessel had taken on the whole of the cargo agreed in said charter party to be taken and was then lying in the Willamette River with the whole of said cargo aboard her; claimant denies that the master of said vessel refused to take on board the whole of the cargo contracted for in said charter party; denies that he refused to carry a full deck

load of said cargo as provided in the charter party, and alleges that at said time he had taken on a full deck load of such cargo; denies that said vessel can carry, or could at said time have carried, on deck not less than, to wit: 800,000 feet of sawn lumber and (or) timber comprising said cargo or any other or greater amount than 238,283 feet thereof, which amount of 238,283 feet was a full deck load for said vessel to carry upon the voyage in question. This claimant admits that the master of said vessel took on deck only 238,283 feet of said cargo, and at the time of the filing of said libel and at all times refused to take any more of said cargo upon said vessel for said voyage.

IV.

In answer to Article IV of said libel this claimant denies that by reason of the refusal of said master to take on deck cargo provided for in said charter party in excess of 238,283 feet, or of the failure of said vessel to carry a deck load in excess of said amount, or on account of any refusal of said master, or any failure of said vessel to carry cargo, or on any other account, libellant has been, is, or will be damaged in a large sum, or any sum, or at all; and denies that by reason of any refusal of said master, or any failure of said vessel to take on cargo for the voyage in question in excess of said amount or by any refusal of said master or any failure of said vessel to carry cargo, or for any other reason, libellant has been, is, or will be damaged in the sum of

since, this claimant was and still is a corporation organized and existing under and by virtue of the laws of Japan, with its principal office and place of business at Osaka in said country, and engaged exclusively in the business of transportation by water in foreign commerce, and was during all of said times, and still is, the owner, in possession and engaged in the operation of said steamer "Saigon Maru", which was at all of said times and still is a Japanese vessel, and not a vessel of the United States, or of the State of Oregon, nor constructed in said state; and said vessel was, at all of said times, and still is, engaged exclusively in transportation in Asiatic waters and between Asia and the United States, at no time entering or sailing upon waters within the limits of the State of Oregon except in the course of said foreign transportation.

IX.

That the charter party, mentioned in the libel herein, provides, among other things, in addition to the provisions hereinbefore admitted to be contained therein, that the cargo therein agreed to be carried should be stowed under the supervision and direction of the master of said vessel and also that libellant should pay to this claimant for the use of said vessel during said voyage two hundred forty shillings, sterling, per thousand feet board measure; and claimant avers that it was to the profit, interest and advantage of this claimant to have taken aboard said vessel on said occasion as large a cargo of said

lumber as it could safely carry, and, further, that all the cargo placed on or carried by said vessel on said voyage consisted exclusively of cargo for libellant carried pursuant to said charter party.

X.

That at the time of the arrival of said vessel in the port of Portland, Oregon, for the purpose of taking on the cargo agreed by this claimant and libellant to be taken on said vessel for the contemplated voyage provided for in said charter party, and at all times since, the master of said vessel was and still is one Captain Y. Yamamoto, who had for many years been master of said vessel and was thoroughly familiar therewith and with the waters through which it was to pass upon the voyage contemplated by said charter party; that upon the occasion of loading said vessel at Portland, Oregon, referred to in the libel herein, after 238,283 feet of the cargo of the kind mentioned in said charter party had been loaded on the deck of said vessel, said captain, acting in the premises in good faith and for the good of all concerned and in the exercise of his sound discretion and judgment as master of said vessel, refused to permit any more cargo to be loaded on said deck, believing, in view of the length of the voyage in question and the dangerous seas through which said vessel had to pass on said voyage, that any greater deckload was unsafe and dangerous and would render said vessel unseaworthy, and that the taking on of any greater deck load would imperil

said vessel, the cargo already thereon, and the lives of those aboard. That, as a matter of fact, it was unsafe and dangerous to place upon the deck of said vessel any greater load than was placed thereon by said captain on the occasion in question, and the placing thereon of any greater deck load would have imperiled said vessel, the cargo already thereon and the lives of those aboard and have rendered said vessel unseaworthy and unfit for said voyage.

XI.

That, after said vessel had been loaded as aforesaid, including the said deck load of 238,283 feet of lumber, etc., libellant accepted bills of lading therefor, paid this claimant the full amount of the stipulated freight for the carriage of said cargo to Bombay, India, as aforesaid, according to the rate provided in said charter party for said carriage, and thereupon on or about the 5th day of June, 1917, said vessel cleared from said port of Portland, Oregon, and proceeded with said cargo upon said voyage, and carried the same to its destination.

Wherefore, having fully answered said libel, claimant prays that said libel be dismissed on the ground of lack of jurisdiction of the subject matter thereof and on the merits.

F. A. HUFFER

and

W. H. HAYDEN,

HUFFER & HAYDEN,

Proctors for Claimant.

STATE OF WASHINGTON,
County of Pierce. ss.

Edwin Orrett, being first duly sworn on oath deposes and says: that he is the local manager of the above named claimant, Osaka Shosen Kaisha, and is authorized to make and does make this verification for and on its behalf; that he has read the said answer, knows the contents thereof, and verily believes the same to be true.

EDWIN ORRETT,

Subscribed and sworn to before me this 26th day of September, 1917.

[Notarial seal.]

F. A. HUFFER,

Notary Public in and for the State of Washington, residing therein at Tacoma, Pierce County.

Filed September 27, 1917. G. H. Marsh, Clerk.

And afterwards, to wit, on the 13th day of October, 1919, there was duly filed in said Court, Amended Libel, in words and figures as follows, to wit:

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a cor-
her tackle, apparel, etc.

Respondent.

vs.

THE JAPANESE STEAMER "SAIGON MARU",
poration,

Libelant,

OSAKA SHOSEN KAISHA, a corporation organized and existing under the laws of Japan,

Claimant.

TO THE HONORABLE CHARLES E. WOLVERTON AND THE
TRICT COURT OF THE UNITED STATES FOR THE DIS-
HONORABLE ROBERT S. BEAN, JUDGES OF THE DIS-
TRICT OF OREGON, IN ADMIRALTY SITTING:

The libelant, Pacific Export Lumber Company, a corporation organized and existing under the laws of the State of Oregon, brings this its amended libel against the Japanese steamer "Saigon Maru", her tackle, etc., and against all persons intervening for their interest in the same, in a cause of contract, civil and maritime, and alleges as follows:

I.

That the libelant is a corporation duly organized and existing under the laws of the State of Oregon and qualified to do business therein.

II.

That on or about the 19th day of March, 1917, the libelant and the owners of said steamer, Osaka Shosen Kaisha, entered into a charter party whereby libelant chartered said steamer from her said owners to carry a full cargo of lumber and (or) timber, including a full deck-load, from a port on the Columbia or Willamette Rivers to Bombay, India. Her said owners agreed with this libelant on the freighting and chartering of the whole of said ves-

sel, including the deck (with the exception of the cabin and necessary room for the crew, and the stowage of provisions, bunker coals, sails and cables) or sufficient room for the cargo in said charter party mentioned.

III.

Pursuant to said charter party said steamer came to Portland, Oregon, and there took on a portion of the cargo which libelant had prepared for shipment upon her, and she was at the time of the filing of the original libel herein then lying in the Willamette River with a portion of said cargo on board, but her master then refused to take on board the whole of said cargo and refused to carry a full deck-load of said cargo as provided in the charter party. Said vessel could have safely carried on deck on the voyage for which she was chartered as aforesaid not less than, to wit, 750,000 feet board measure of sawn lumber and (or) timber comprising said cargo, and a full cargo according to the custom of the port of loading, which was known to said ship's agents and owners at the time of her chartering, or was of such general acceptance that they were bound to take notice thereof, would have included at least 750,000 feet board measure on deck, but her master took on deck only 241,559 feet board measure and refused to take any more and never did take any more, but departed on said voyage with a deck-load of only 241,559 feet board measure.

IV.

That libelant had sold the cargo of lumber to be carried on said steamer to a firm of lumber merchants in Bombay, India, to wit, Gillanders, Arbuthnot & Co., the amount sold to them being 5500 tons, ten per cent more or less, so that the minimum quantity to be delivered under said contract was 4950 tons. That the owners and agents of said "Sai-gon Maru" knew when they chartered her to this libelant that libelant had sold said lumber cargo in Bombay and was chartering said steamer for the express purpose of transporting it to Bombay, and that a certain portion of said cargo would be timbers of long lengths. Said long lengths would have formed part of the deck-load that was left behind, and the steamer's refusal to carry said deck-load was also a refusal to take said long lengths.

V .

Said steamer was in fact able to carry said deck cargo of 750,000 feet board measure, but if, as claimant contends, she was not able to carry it on account of the arrangement of her steering gear or on account of her tenderness due to the arrangement and use of her coal bunkers, or the structure of her ballast tanks, or otherwise, she was not seaworthy for the voyage for which libelant chartered her.

VI.

That by reason of the refusal and failure of

said vessel and of her master to carry a full deck-load as agreed in said charter party, the libelant is damaged in the sum of \$4044.65, being loss of profits to libelant on the amount of lumber which the vessel failed to carry and should have carried, and is damaged in the further sum of, to wit, \$6800.00, being the amount this libelant owes to Gillanders, Arbuthnot & Co. on account of the loss occasioned to them by the ship's failure to carry to them the amount of lumber this libelant had sold them, and the longer lengths which would have formed part of the deck-load. Said \$6800.00 is stated approximately for the reason that libelant's liability to its said purchaser is measured in English pounds and Indian rupees, the rate of exchange on which is constantly varying. Said liability to said purchasers is 1075 English pounds for short delivery and 4950 rupees for failure to deliver the long lengths, and the libelant should be awarded enough (in addition to its said lost profits) to enable it to pay its said purchaser in full for said liability at the rate of exchange prevailing when the award herein is made. Libelant is damaged by said refusal to carry a full deck-load the sum of \$10,844.65, together with interest on the same at the rate of six per cent per annum from the date said charter party was breached as herein alleged, to wit, — until paid.

VII.

That said steamer at the time of the commence-

ment of this suit and the filing of the libel herein, was in the Willamette River at Portland, Oregon, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

VIII.

That all and singular the premises are true.

Wherefore, libelant prays that process in due form, according to the practice of this court in cases of admiralty and maritime jurisdiction, may issue against said steamer, her tackle, apparel, etc., and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this Honorable Court may be pleased to decree the payment of the damages aforesaid, with costs, and that the said vessel may be condemned and sold to pay the same, or that her stipulators be compelled to pay the same, and that the libelant may have such other and further relief in the premises as in law and justice it may be entitled to receive.

ERSKINE WOOD,

Proctor for Libelant.

UNITED STATES OF AMERICA, }
District of Oregon. } ss.

I, W. D. Wheelwright, being first duly sworn, say that I am president of the libelant in the above entitled cause; that I am familiar with the contents of the within amended libel and that the allegations therein contained are true, as I verily believe.

WM. D. WHEELWRIGHT.

Subscribed and sworn to before me this 8th day of October, 1919.

[Notarial Seal.]

J. F. QUIRK,

Notary Public for Oregon.

My commission expires Sept. 2, 1923.

Filed Oct. 13, 1919. G. H. Marsh, Clerk.

And afterwards, to wit, on the 28th day of October, 1919, there was duly filed in said Court, claimant's exceptions to amended libel, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

No. 7467.

EXCEPTIONS TO AMENDED LIBEL.

PACIFIC EXPORT LUMBER COMPANY, a corporation, Libelant,

vs.

THE JAPANESE STEAMER "SAIGON MARU", her tackle, apparel, etc. Respondent.

OSAKA SHOSHEN KAISHA, a corporation organized and existing under the laws of Japan, Claimant.

TO THE HONORABLE CHARLES E. WOLVERTON AND THE HONORABLE ROBERT S. BEAN, JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON, IN ADMIRALTY SITTING:

Comes now the above named claimant, Osaka

Shosen Kaisha, a corporation, and files these its exceptions to the amended libel of the above named libelant, Pacific Export Lumber Company, a corporation, and objects and excepts to said libel, and for cause of exception, alleges:

I.

That said amended libel shows that this cause is not a cause of admiralty or maritime jurisdiction, and that this court sitting in admiralty has no jurisdiction to hear or determine the same.

II.

That said amended libel fails to show that this is a cause of admiralty or maritime jurisdiction, or that this court sitting in admiralty has jurisdiction to hear or determine the same.

III.

That the subject matter of this action is without the jurisdiction of this court.

IV.

That said amended libel fails to show that this court has, or at the time of the commencement of this suit had, any jurisdiction of said steamship "Saigon Maru."

V.

That said amended libel shows that at the time of the commencement of this suit this court did

not have, and that it does not now have, jurisdiction of said steamship "Saigon Maru."

VI.

That said amended libel fails to state facts sufficient to show any power, authority or jurisdiction to arrest said vessel by reason of the matters and things, or any of them, alleged in said libel, or by reason of any other matter or thing.

VII.

That it appears in and by said amended libel that the arrest and seizure of said vessel herein was unlawful and unauthorized.

VIII.

That said amended libel shows that it is based upon the alleged non-performance by claimant of an executory contract of affreightment, and that at the time of the commencement of this suit and the arrest of said vessel, said "Saigon Maru" was a Japanese vessel and not a vessel of the United States or a domestic vessel of the State of Oregon, and that no part of the lumber or timber, which libelant alleges said vessel refused to carry, was ever placed in or upon said vessel, and, therefore, that libelant has, and at the time of the commencement of the suit, had no lien upon or claim or cause of action against said vessel which is within the admiralty or maritime jurisdiction of this court, or which this court, sitting in admiralty, has any power to hear, adjudicate or determine.

IX.

That said amended libel shows it is based upon the alleged non-performance by claimant of an executory contract of affreightment, and fails to show that the said vessel "Saigon Maru" was at any of the times mentioned in said libel a domestic vessel of the State of Oregon or used in navigating the waters of said State or constructed therein, or that any part of the lumber or timber, which, libelant alleges, said vessel refused to carry, was ever placed in or upon said vessel, and therefore fails to show that at the time of the commencement of this suit, or at the time of the arrest of said vessel, libelant had, or now has, any lien upon or claim or cause of action against said vessel which is within the admiralty or maritime jurisdiction of this court, or which this court, sitting in admiralty, has any power to hear, adjudicate or determine.

X.

That said amended libel fails to state facts sufficient to show any right on the part of libelant to proceed in rem against said vessel, or to cause the arrest thereof, or to state any cause of action in rem against the same.

XI.

That said amended libel fails to state facts sufficiently to show any jurisdiction of said vessel

by this court, or any power of this court to make any adjudication with reference thereto, but on the contrary shows that this court has no such power or jurisdiction.

XII.

That said amended libel fails to state facts sufficient to show that libelant has, or at the time of the commencement of this suit, or the arrest of said vessel had, any lien upon said vessel cognizable by this court as a court of admiralty and maritime jurisdiction.

XIII.

That it appears in and by said amended libel that whatever cause of action, if any, libelant may have is one in personam and not in rem.

And, claimant, not waiving any of its said objections or exceptions, but still insisting upon the same and each of them, makes and files the following objections and exceptions which it asks to have sustained in the event claimant's objections herein to the jurisdiction are overruled.

XIV.

That said amended libel fails to state facts sufficient to constitute a cause of action against said vessel or to show that libelant has, or at the time of the commencement of this suit had any lien upon or claim against the same, either under the general maritime law or the laws of the United States, or

the laws of the State of Oregon, but, on the contrary, shows that it has not now, nor at the time of the commencement of this suit or at any time had any such lien or claim.

XV.

That said amended libel shows that it is based upon the alleged non-performance by claimant of an executory contract of affreightment, and that at the time of the commencement of this suit and the arrest of said vessel, said "Saigon Maru" was a Japanese vessel and not a vessel of the United States, or a domestic vessel of the State of Oregon, and that no part of the lumber or timber which libelant alleges said vessel refused to carry was ever placed in or upon said vessel, and therefore that libelant has, and at the time of the commencement of the suit had, no lien upon or claim or cause of action against said vessel, either under the general maritime law or the laws of the United States, or the laws of the State of Oregon.

XVI.

That said amended libel shows it is based upon the alleged non-performance by claimant of an executory contract of affreightment, and fails to show that the said vessel "Saigon Maru" was at any of the times mentioned in said libel a domestic vessel of the State of Oregon, or used in navigating the waters of said State or constructed therein, or that any part of the lumber or timber which libelant alleges said vessel refused to carry was

ever placed in or upon said vessel, and therefore fails to show that at the time of the commencement of this suit, or at the time of the arrest of said vessel, libelant had, or now has, any lien upon or claim or cause of action against said vessel, either under the general maritime law, or the laws of the United States, or the laws of the State of Oregon.

XVII.

Claimant objects and excepts to Article IV of said amendment libel for that the allegations therein contained and each of them are immaterial and irrelevant and the item of damage therein referred to too remote to be recoverable as an item of damage, and especially excepts to the last five lines of said article commencing with the words "and that a certain portion of said cargo" and continuing to the end of the paragraph for that the same is too indefinite, uncertain and general to be answered by claimant or to apprise claimant of the nature or basis of libelant's claim for damages on account of the "long lengths" therein referred to in that neither the quantity, cost, market price or any other data respecting such long lengths is alleged, and further on the ground that said claim for damages on account of long lengths is too remote, speculative, indefinite and uncertain to be a recoverable item of damage.

XVIII.

Claimant excepts and objects to Article VI of

said amended libel in the following particulars, to wit:

(1) In that the same is too indefinite, uncertain and general to be answered by claimant or to apprise claimant of the nature or basis of the claims for damages therein alleged and in that the same fails to state how and in what manner and in what particulars libelant has suffered the damages therein alleged.

(2) In that the claim for \$4044.65 for loss of profits is immaterial, irrelevant and too remote, indefinite, uncertain and speculative to be a recoverable item of damage herein, and in that no sufficient facts are stated to apprise claimant of the basis upon which said claim is made.

(3) In that the claim for \$6800.00 therein mentioned is immaterial, irrelevant, too remote, speculative, contingent and uncertain to be a recoverable item of damage.

(4) In that the said claims for \$4044.65 and \$6800.00 are overlapping claims and claims for double damages.

In all of which particulars the said amended libel is insufficient and, therefore, this claimant is not bound to answer the same and it prays that said libel may be dismissed with costs.

Dated this 23rd day of October, 1919.

FRANK A. HUFFER,
and

HUFFER & HAYDEN,
Proctors for Claimant.

UNITED STATES OF AMERICA, }
District of Oregon. } ss.

I, Frank A. Huffer, one of the proctors of this court and of the above named claimant, do hereby certify that in my opinion the foregoing exceptions and each of them are well founded in point of law.

Dated this 23rd day of October, 1919.

FRANK A. HUFFER,
Of Proctors for Claimant.

STATE OF WASHINGTON, }
County of Pierce. } ss.

M. Higuchi, being first duly sworn, on oath deposes and says: That he is the general manager for the United States of the above named claimant, Osaka Shosen Kaisha, and is authorized to make and does make this verification for and on its behalf; that he has read the foregoing exceptions, knows the contents thereof, and that the same are true.

M. HIGUCHI.

Subscribed and sworn to before me this 23rd dayday of October, 1919.

[Notary's Seal.]

F. A. HUFFER,

Notary Public in and for the State of Washington, residing at Tacoma in said County and State.

Filed October 28, 1919. G. H. Marsh, Clerk.

And afterwards, to wit, on Monday, the 1st day of December, 1919, the same being the 24th judicial

day of the regular November term of said Court; present the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

In the District Court of the United States for the District of Oregon.

No. 7467.

December 1, 1919.

PACIFIC EXPORT LUMBER COMPANY,

Libellant,

vs.

THE "SAIGON MARU."

OSAKA SHOSEN KAISHA,

Claimant.

Now, at this day, this cause comes on to be heard upon the exceptions to the amended libel herein, the libellant appearing by Mr. Erskine Wood, of proctors, and the claimant by Mr. Frank A. Huffer, of proctors; On consideration whereof,

IT IS ORDERED AND ADJUDGED that said exceptions and each of them be, and the same are hereby, overruled to which ruling said claimant excepts and its exceptions are allowed. This order is without prejudice to the right of claimant to present at the final hearing the questions raised by said exceptions.

Filed Dec. 1, 1919. G. H. Marsh, Clerk.

And afterwards, to wit, on the 1st day of December,

1919, there was duly filed in said Court, claimant's answer to amended libel, in words and figures as follows, to wit:

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

CLAIMANT'S ANSWER TO AMENDED LIBEL.
PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libelant,

vs.

THE JAPANESE STEAMER "SAIGON MARU,"
her tackle, apparel, etc.,

Respondent.

OSAKA SHOSEN KAISHA, a corporation organized and existing under the laws of Japan,
Claimant.

TO THE HONORABLE CHARLES E. WOLVERTON AND
HONORABLE ROBERT S. BEAN, JUDGES OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON, IN ADMIRALTY SITTING:

Now comes the Osaka Shosen Kaisha, a corporation organized and existing under and by virtue of the laws of Japan, with its principal place of business at the City of Osaka in said country, owner and claimant of the above named Japanese steamer "Saigon Maru", her tackle, apparel, etc., and not waiving its objections to the jurisdiction of the court nor any other of the exceptions or objections contained in its

exceptions to the amended libel herein, but still insisting on said objections and exceptions and each of them, for answer to the amended libel and complaint of Pacific Export Lumber Company, a corporation, in an alleged cause of contract, civil and maritime, admits, denies and alleges as follows:

I.

In answer to Article I of said amended libel claimant is not advised as to whether the said libelant is a corporation duly organized and existing under the laws of the State of Oregon or qualified to do business therein, and for that reason denies each and every of the allegations in that behalf, and demands strict proof of the same, and each of them, if they be pertinent.

II.

In answer to Article II of said amended libel claimant admits that on or about the 19th day of March, 1917, the libelant and his claimant, Osaka Shosen Kaisha, being then the owner of said steamer "Saigon Maru," entered into a charter party, whereby said claimant agreed with said libelant on the freighting and chartering of the whole of said vessel, including the deck (with the exception of the cabin, necessary room for the crew, and the stowage of provisions, bunker coals, sails and cables), or sufficient room for the cargo in said charter party mentioned, for a voyage from a port on the Columbia or Willamette River to Bombay,

India, and whereby said libelant engaged to furnish to said vessel, at the designated loading place or places, as therein provided, a full cargo of sawn lumber and (or) timber of such length and sizes as could be taken through said vessel's hatchways and (or) bow and (or) stern ports, if any, and on deck; denies that in or by said charter party it is provided that said vessel was to carry a full deck load of the cargo therein mentioned; and this claimant denies each and every allegation contained in said Article II not herein expressly admitted.

III.

In answer to Article III of said amended libel this claimant admits that pursuant to said charter party said steamer came to Portland, Oregon, and took on a full cargo of the kind mentioned in said charter party, and that she was at the time of filing said libel lying in the Willamette River, but this claimant denies that libelant had prepared for shipment upon said vessel any cargo other than or in addition to said cargo already aboard her or that said vessel took on only a portion of the cargo which libelant had prepared for shipment upon her, and, in this connection, claimant avers that at the time of the filing of said libel and the commencement of this suit, said vessel had taken on the whole of the cargo agreed in said charter party to be taken and was then lying in the Willamette River with the whole of said cargo aboard

her; claimant denies that the master of said vessel refused to take on board the whole of the cargo contracted for in said charter party; denies that he refused to carry a full deck load of said cargo as provided in the charter party, and alleges that at said time he had taken on a full deck load of such cargo; denies that said vessel can carry, or could at said time have carried, on deck not less than, to wit: 750,000 feet of sawn lumber and (or) timber comprising said cargo or any other or greater amount than 241,559 feet thereof, which amount of 241,559 feet was a full deck load for said vessel to carry upon the voyage in question. This claimant admits that the master of said vessel took on deck only 241,559 feet of said cargo, and at the time of the filing of said libel and at all times refused to take any more of said cargo upon said vessel for said voyage. Claimant denies that a full cargo, according to the custom of the port of loading or any other custom or otherwise, was at least 750,000 feet board measure on deck, or any other amount of lumber greater than 241,559 feet board measure; denies that there was any custom at the port of loading said vessel with respect to deck loads on such vessels as the "Saigon Maru," and also denies that the said vessel, agents or owners or any of them at the time of chartering said vessel knew of any such custom as that alleged by libelant or that any such custom was of such general acceptance that they were bound to take notice thereof.

III-A.

In answer to paragraph IV of said libel, claimant denies that libelant had sold the cargo of lumber to be carried on said vessel or any cargo of lumber or any part thereof to Gillanders, Arbuthnot & Co. or to any other firm of lumber merchants in India, 5500 tons of lumber, ten per cent more or less, or 4950 tons thereof or any other amount thereof; denies that the owners or agents or any of them of the "Saigon Maru" knew when they chartered her to libelant or at any other time that libelant had sold said lumber cargo or any lumber cargo or any part thereof in Bombay or at any other place or that libelant was chartering said steamer for the purpose of transporting said cargo of lumber or any lumber so sold to Bombay or to any other place or that a certain portion or any portion of any such cargo would be timbers of long lengths or that any such long lengths would have formed any part of the deck load that was left behind and denies that the refusal to carry said deck load was also a refusal to take such long lengths or any part of any long lengths; and claimant denies each and every other allegation in said paragraph contained.

IV.

In answer to Article V of said amended libel claimant denies that said vessel was in fact or otherwise able to carry on deck a cargo of 750,000 feet board measure or any greater amount of

lumber than 241,559 feet board measure, and denies that if she was not able to carry on deck a cargo of 750,000 feet board measure or any other amount on account of the arrangement of her steering gear or on account of her tenderness due to the arrangement and use of her coal bunkers or the structure of her ballast tanks, or otherwise, or that she was on any other condition or supposition unseaworthy for the voyage for which she was chartered, and claimant denies that said vessel was at said time or at any time unseaworthy for the voyage for which she was chartered.

V.

In answer to Article VI of said amended libel claimant denies that by the refusal or failure of said vessel or of her master to carry a full deck load as agreed in said charter party, or for any other reason, the libelant was or is damaged in the sum of \$4044.65 for loss of profits on the amount of lumber which the vessel failed to carry and should have carried, or any loss of profits on any lumber which said vessel failed to carry; denies that libelant owes to Gillanders, Arbuthnot & Co. the sum of \$6800.00 or any other amount on account of any loss sustained to them by said vessel's failure to carry to them the amount of lumber which libelant had sold them or the longer lengths which would have formed a part of the deck load, and denies that libelant is damaged in the sum of \$6800.00 or any other sum or amount by reason of owing said

firm on account of failure to ship any lumber to them on said "Saigon Maru" or on any other account or for any other reason. Claimant has no knowledge or information sufficient to form a belief as to why libelant has stated his damage approximately in the sum of \$6800.00 instead of stating the same precisely and, therefore, requires strict proof of same. Claimant denies that libelant's liability to said purchasers is 1075 English pounds or any other sum or amount for short delivery, or 4950 rupees or any other sum or amount for failure to deliver the long lengths, and also denies that libelant should be awarded enough in addition to its lost profits or otherwise to enable it to pay its said alleged purchaser in full for said alleged liability at the rate of exchange prevailing when the award herein is made, or that libelant should be awarded anything or any sum to enable it to pay said purchasers any amount whatsoever either at the rate of exchange prevailing when the award herein is made or at any other time. Claimant denies that libelant refused to carry a full deck load, and denies that by reason of claimant refusing to take on deck on said voyage any quantity of lumber in excess of 241,559 feet board measure libelant was or is damaged in the sum of \$10,844.65, together with interest on the same at the rate of six per cent per annum from the date of the alleged breach of said charter party, or in any other sum or amount, and in this connection claimant denies that it was guilty of any breach of said charter

party as alleged in said amended libel or otherwise.

VI.

In answer to Article VII of said amended libel claimant admits that at the time of the commencement of this suit and the filing of the amended libel herein said vessel was in the Willamette River at Portland, Oregon, on waters within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

VII.

In answer to Article VIII of this amended libel claimant denies that all and singular or any of the premises therein are true except as herein expressly admitted.

FIRST AFFIRMATIVE DEFENSE.

Further answering said amended libel and as a first affirmative defense thereto, claimant alleges:

VIII.

And further answering said amended libel and objecting to the jurisdiction of this court over the subject matter of this action this claimant alleges that, at the time of the execution of the charter party mentioned in the libel herein, and at all times since, this claimant was and still is a corporation organized and existing under and by virtue of the laws of Japan, with its principal

office and place of business at Osaka in said country, and engaged exclusively in the business of transportation by water in foreign commerce, and was during all of said times, and still is, the owner, in possession and engaged in the operation of said steamer "Saigon Maru," which was at all of said times and still is a Japanese vessel, and not a vessel of the United States, or of the State of Oregon, nor constructed in said state; and said vessel was, at all of said times and still is engaged exclusively in transportation in Asiatic waters and between Asia and the United States, at no time entering or sailing upon waters within the limits of the State of Oregon except in the course of said foreign transportation.

Wherefore claimant prays that this action be dismissed on the ground and for the reason that this court has no jurisdiction of the subject matter thereof, or of said vessel.

SECOND AFFIRMATIVE DEFENSE.

And further answering said amended libel, and as a second affirmative defense thereto, claimant alleges:

IX.

That, at the time of the execution of the charter party mentioned in the amended libel herein, and at all times since, this claimant was and still is a corporation organized and existing under and

by virtue of the laws of Japan, with its principal office and place of business at Osaka in said country, and engaged exclusively in the business of transportation by water in foreign commerce, and was during all of said times, and still is, the owner, in possession and engaged in the operation of said steamer "Saigon Maru," which was at all of said times and still is a Japanese vessel, and not a vessel of the United States, or of the State of Oregon, nor constructed in said state; and said vessel was, at all of said times, and still is, engaged exclusively in transportation in Asiatic waters and between Asia and the United States, at no time entering or sailing upon waters within the limits of the State of Oregon except in the course of said foreign transportation.

X.

That the charter party, mentioned in the amended libel herein, provides, among other things, in addition to the provisions hereinbefore admitted to be contained therein, that the cargo therein agreed to be carried should be stowed under the supervision and direction of the master of said vessel and also that libelant should pay to this claimant for the use of said vessel during said voyage two hundred forty shillings, sterling, per thousand feet board measure; and claimant avers that it was to the profit, interest and advantage of this claimant to have taken aboard said vessel on said occasion as large a cargo of said lumber as it could

safely carry, and, further, that all the cargo placed on or carried by said vessel on said voyage consisted exclusively of cargo for libelant carried pursuant to said charter party.

XI.

That at the time of the arrival of said vessel in the port of Portland, Oregon, for the purpose of taking on the cargo agreed by this claimant and libelant to be taken on said vessel for the contemplated voyage provided for in said charter party, and at all times since, the master of said vessel was one Captain Y. Yamamoto, who had for many years been master of said vessel and was thoroughly familiar therewith and with the waters through which it was to pass upon the voyage contemplated by said charter party; that upon the occasion of loading said vessel at Portland, Oregon, referred to in the amended libel herein, after 241,559 feet of the cargo of the kind mentioned in said charter party had been loaded on the deck of said vessel, said captain, acting in the premises in good faith and for the good of all concerned and in the exercise of his sound discretion and judgment as master of said vessel, refused to permit any more cargo to be loaded on said deck, believing, in view of the length of the voyage in question and the dangerous seas through which said vessel had to pass on said voyage, that any greater deck load was unsafe and dangerous and would render said vessel unseaworthy, and that the taking on of any greater deck

load would imperil said vessel, the cargo already thereon, and the lives of those aboard. That, as a matter of fact, it was unsafe and dangerous to place upon the deck of said vessel any greater load than was placed thereon by said captain on the occasion in question, and the placing thereon of any greater deck load would have imperiled said vessel, the cargo already thereon and the lives of those aboard and have rendered said vessel unseaworthy and unfit for said voyage.

XII.

That, after said vessel had been loaded, as aforesaid, including the said deck load of 241,559 feet of lumber, etc., libelant accepted bills of lading therefor, paid this claimant the full amount of the stipulated freight for the carriage of said cargo to Bombay, India, as aforesaid, according to the rate provided in said charter party for said carriage, and thereupon on or about the 5th day of June, 1917, said vessel cleared from said port of Portland, Oregon, and proceeded with said cargo upon said voyage, and carried the same to its destination.

Wherefore, having fully answered said amended libel, claimant prays that said amended libel be dismissed on the ground of lack of jurisdiction of the subject matter thereof and on the merits.

F. A. HUFFER,

W. H. HAYDEN,

HUFFER & HAYDEN,

Proctors for Claimant.

STATE OF WASHINGTON, }
County of Pierce. } ss.

M. Higuchi, being first duly sworn, on oath deposes and says: That he is the General Manager for the United States of the above named claimant, Osaka Shosen Kaisha, and is authorized to make and does make this verification for and on its behalf; that he has read the said answer, knows the contents thereof, and verily believes the same to be true.

M. HIGUCHI.

Subscribed and sworn to before me this 29th day of November, 1919.

[Notarial Seal.]

F. A. HUFFER,

Notary Public in and for the State of Washington, residing at Tacoma in said County and State.

Filed December 1, 1919. G. H. Marsh, Clerk.

TRIAL.

And afterwards, to wit, on Friday, the 12th day of December, 1919, the same being the 34th judicial day of the regular November term of said Court; present the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

Filed March 1, 1920. G. H. Marsh, Clerk.

*In the District Court of the United States for the
District of Oregon.*

PACIFIC EXPORT LUMBER CO., Libelant,

v.

THE JAPANESE STEAMER "SAIGON MARU,"
her tackle, apparel, etc., Respondent,

OSAKA SHOSEN KAISHA, Claimant.

Be it remembered that heretofore and on, to wit, the 12th day of December, 1919, the above entitled cause came on duly and regularly for hearing before the Honorable Charles E. Wolverton, U. S. District Judge in the above entitled court, libelant appearing by Messrs. Wood. Montague & Matthiessen, its proctors, and the claimant appearing by Messrs. Huffer & Hayden, its proctors, and thereupon the following testimony was taken and the following proceedings were had, to wit:

WILLIAM D. WHEELWRIGHT, called as a witness on behalf of the libelant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Wood:

Mr. Huffer: We wish at this time, your Honor, to object to the introduction of any testimony, on the ground that the libel does not state facts sufficient to constitute a cause of action against the ship, to show any lien against the vessel, or to show any right to proceed in rem; on the ground, your Honor, of the specifications stated in our exceptions to the amended libel which is on file.

Court: Very well. I will overrule the objection, subject to your argument on the exceptions to the libel.

Mr. Wood: It is admitted by counsel that the Pacific Export Lumber Company is a corporation organized in the State of Oregon.

Court: Very well.

Q. Mr. Wheelwright, what position do you hold in the Pacific Export Lumber Company?

A. President.

Q. And what is the Pacific Export Lumber Company?

A. It is an Oregon corporation, formed in 1896.

Q. Engaged in what business?

A. Engaged principally in the exportation of lumber.

Q. To what places?

A. Oh, to all parts of the world; but more largely to Japan, China and India, and Manila.

Q. How long has the Pacific Export Lumber Company been engaged in that business?

A. Twenty-three years.

Q. Have you been its head all that time?

A. All the time.

Q. From what ports does it export lumber?

A. Well, very largely from Portland—Columbia River; but also, to a lesser extent, from Puget Sound ports; some little from California.

Q. Can you give the court some idea of the extent of the business of the Pacific Export Lumber Company—its magnitude? By that, I mean to say the number of steamers that would load for the Orient in the course of a normal year; something like that.

A. It is rather hard for me to say. We have done all the way from fifty million to one hundred million feet of business in a year, in this way, differing in different years.

Q. Can you state the first step that led toward the chartering of the Saigon Maru by the Pacific Export Lumber Company?

A. Well, my recollection is that—it is something over two years ago—we were always looking out for a chance to sell lumber to go to India and China and other places; and my recollection is that we had an active inquiry from Bombay for a shipment of cargo to that port, and we were looking about to see if we could get an offer of a steamer at a rate of freight that would enable us to take the business at the market price. My

associate, Mr. Blodgett, the secretary of the company, saw Mr. Orrett in Tacoma.

Mr. Hayden: Pardon me just a moment. I take it that this that took place between Mr. Blodgett and Mr. Orrett ought to be testified to by Mr. Blodgett, not by Mr. Wheelwright. I object to it on the ground it is hearsay.

A. Well, Mr. Blodgett said to me on his return from a visit to the Sound that he thought Mr. Orrett could get us a vessel for Bombay, one of the Osaka Shosen Kaisha vessels.

Q. Mr. Orrett was the representative of that Japanese company, was he not?

A. Mr. Orrett was the Tacoma agent of that company. But, anyhow, we had a telegram from Mr. Orrett asking if we——

Objected to.

A. Well, the telegram is here if you want to put it in evidence.

Court: I suppose the telegram is the best evidence.

Q. I will ask you, Mr. Wheelwright, if this is the telegram you were about to refer to?

A. I received this telegram signed "Edwin Orrett" on the 7th of March, 1917: "Have you any inquiries or do you know of any offers for lumber for Bombay; subject to proper inducements we might put boat on berth May loading. Edwin Orrett." That was the first step in the negotiations.

Mr. Wood: I will offer this telegram in evidence.

Marked "Libelant's Exhibit A."

Court: Mr. Huffer, I suppose your objection goes to all this testimony?

Mr. Huffer: Yes, your Honor.

Court: Very well.

Q. Mr. Wheelwright, I show you a letter purporting to bear your signature, and ask you if that is the reply you made to the telegram just introduced?

A. Yes. It refers to the telegram of the 7th. That is the one about Bombay.

Mr. Wood: I will offer this in evidence.

Mr. Huffer: Objected to as irrelevant and immaterial, all of the contract between the parties being reduced to writing, and that writing merges all prior negotiations and correspondence introduced for the purpose of proving any special damages or notice. It is irrelevant and immaterial for that purpose. And upon the further ground that any such damages are too remote, speculative, and contingent to be recovered.

Court: I suppose you refer to the charter party.

Mr. Huffer: Yes, your Honor.

Court: All prior negotiations are merged in the charter party?

Mr. Huffer: Yes, your Honor.

Court: I suppose these letters are a circumstance showing what led up to the transaction.

Mr. Wood: Yes, they show the situation of the parties when they entered into the charter party, and also this letter shows that the ship through Mr.

Orrett had notice of the sale of this cargo in Bombay.

Court: I will overrule the objection.

Mr. Huffer: We will save an exception.

Marked "Libelant's Exhibit B," and reading as follows:

"Pacific Export Lumber Co.

1004 Chamber of Commerce Bldg.

Portland, Oregon, Mar. 9, 1917.

Edwin Orrett, Esq.,

Tacoma, Washington.

Dear Sir:

Referring to your telegram of the 7th about Bombay, we are this afternoon in receipt of a cable from our friends there renewing an offer that they made some time since for a full cargo of Oregon pine lumber for that port, quantity not to exceed 4,500,000 ft. (The cable is mutilated but we understand one word in it to mean that they prefer a smaller quantity.) Shipment to be made in March-April-May. The cargo would be furnished according to the enclosed schedule called 'ADNECI,' stowage limited to 10% and to go at half rate, 300 M ft. per working day for loading and the same for discharging; demurrage at a fair rate and despatch money to be allowed at $\frac{3}{4}$ of said rate. We can supply a cargo accordingly at not more than two loading points on the Columbia-Willamette Rivers, laydays April 15th or thereabouts. Freight we assume would be payable in the usual manner at Bombay.

Now as to the rate: The original offer came to us at a time when 200/ was being paid, but since then the 'Thordis' has been taken at 250/, so that our buyers will have to come up materially in their views. The 'Thordis' charter was looked upon as of a panicky nature to fill a short sale, and we doubt if our friends will pay a price that would justify that rate; we are quite sure they will pay more than 200/, but how much more we can't say. If you will make us a firm offer, or intimate a rate we will cable on it.

Yours faithfully,

PACIFIC EXPORT LUMBER CO.,

By Wm. D. Wheelwright, President.

Enclosure: Schedule 'ADNECI'

SCHEDULE OF OREGON PINE FOR BOMBAY.
'ADNECI'

1,200,000 ft.	12 x 12	24 to 34 ft.
1,500,000 ft.	12 x 12	35 and up, average 45.
60,000 ft.	1 x 12	} 16 and up.
60,000 ft.	1½ x 12	
60,000 ft.	2 x 12	
60,000 ft.	2½ x 12	
360,000 ft.	6 x 12	
60,000 ft.	3 x 5	
120,000 ft.	3 x 8	
120,000 ft.	3 x 9	
120,000 ft.	2½ x 4	
120,000 ft.	2½ x 8	
120,000 ft.	2½ x 9	
60,000 ft.	2½ x 5	
240,000 ft.	8 x 8	20 and up.
240,000 ft.	9 x 9	20 and up.

4,500,000 ft.

Necessary stowage in 3" and under, 12 to 15 ft. long."

Q. I show you a telegram, Mr. Wheelwright, dated March 13th, and ask you what that is?

A. This is a telegram that we received on the 13th day of March, signed Edwin Orrett.

Q. It relates to this same business, does it not?

A. Yes, it is this same negotiation, four days later than our letter to him.

Mr. Wood: I offer the telegram in evidence.
Same objection. Objection overruled.
Exception allowed.

Marked "Libelant's Exhibit C," and reading:

"Tacoma, Wash., Mar. 13, 1917.
Pacific Export Lumber Co., Portland, Or.:

Have received cable from Osaka today begin
Bombay lumber April-May loading will take full
load for Saigon freight rate two hundred forty
shillings less five per cent loading per day three
hundred thousand feet or more discharging lay-
days ten days demurrage two thousand dollars
per day cancelling date June fifteenth will take
on deck as much as possible lessen long stuff as
much as possible delivery fas both ends freight
to be prepaid waiting your reply end please ad-
vise further.

12:21 PM.

EDWIN ORRETT."

Mr. Wood: Have you the telegram from the
Pacific Export Lumber Company to Mr. Orrett
dated March 17th? I have a copy if you have not.

Mr. Huffer: You better use your copy.

Q. Mr. Wheelwright, I will show you copy of
telegram from your company to Mr. Edwin Or-
rett, dated the 17th, is it not?

A. Yes.

Q. That refers also to this same negotiation,
does it not?

A. It does. March 17th.

Mr. Wood: I offer this in evidence. Counsel was notified to produce the original, but has not, and consents to the use of the copy.

Same objection. Same ruling and exception.

Marked "Libelant's Exhibit D," and reading:

"March 17, 1917. 10 A. M.

Edwin Orrett,
Care Osaka Shosen Kaisha,
Tacoma, Wash.

We accept 'Saigon' on terms of charter party mailed thirteenth erasing condition about deck load insurance you filling in date before which laydays cannot begin, and cancelling date. The only difference between your terms and ours as we understand it is that owners allow ten days for discharging at Bombay, while our condition is three hundred thousand feet per working day. You need not mention dispatch money in cable or cancelling date beyond saying seems late prefer earlier. Get steamer's location and prospective voyage with date for laydays.

PACIFIC EXPORT LUMBER CO."

Mr. Wood: The next is a letter which counsel asked me to produce, dated March 19th, from Mr. Orrett to the Pacific Export Lumber Co., and I will, in response to their request, offer it.

Mr. Huffer: We haven't asked you to offer it.

Mr. Wood: All right, I will give it to you, then. I will offer it anyway.

Same objection. Objection overruled. Exception allowed.

Marked "Libelant's Exhibit E," and reading as follows:

"Tacoma, U. S. A., Mar. 19, 1917.

Refer to File No. 525-1.

The Pacific Export Lumber Co.,
Portland, Ore.

Dear Sirs:

Lumber Shipment for Bombay.

Referring to your favor of March 13d, relative to the above.

We return herewith the form of charter party enclosed with your letter, in accordance with your kind suggestion of even date by telephone.

On the 17th we cabled to Osaka, advising them that if possible, you preferred an earlier cancelling date than June 15th; and we asked for the steamer's location, prospective voyage, and date laydays would begin. Previously we had cabled to them that you promised 300,000 ft. or more per working day, both for loading and discharging, which they have agreed to.

Your telegram of the 17th advised us that we need not mention dispatch money in the cable, but we have no authority to waive that portion of the charter party that will provide \$2000.00 for each day's detention.

We intend to take on deck as much as will be allowed by the ship's officers.

The freight money will have to be prepaid at this end at the rate of 240 s. less 5%. The charter party, we note provides for 90 days' sight bills on London. We assume from this that you are not willing to pay at sight, which we would naturally prefer. Ten per cent of short stuff for stowage at half rates.

My principals advise by cable that the steamer is figured to arrive at the Columbia River on or about May 20th, and loading will begin at once. They ask me not to make any change in the cancelling date, so June 15th must stand.

The amount of lumber that will be carried, will depend upon the length, etc. The actual measurement space of the steamer for cargo, under deck, is 7500 tons, and they ask that we will not contract for very long stuff. My experience with regard to loading a full cargo of lumber, is somewhat limited, but it seems to me that the specification that you submitted is a satisfactory one, and I ask that you will be good enough to restrict the lengths to a reasonable minimum; and I was much gratified to receive your telephone advice that you would take care of extra lengths, and would see that such were loaded on deck.

For your better information would advise that 'SAIGON MARU' has holds, dimensions as follows:

No. 1	hold	—length	59 ft.,	height	22 ft.
No. 2	"	"	51 "	"	20 "
No. 3	"	"	59 "	"	20 "
No. 4	"	"	69 "	"	21 "

Tweendeck: Length No. 1, No. 3, No. 4 same as that for each hold respectively.

Length No. 2, 53 ft.

Height: All the same height of 7 ft.

Hatch coaming: Length 24 ft., width 16 ft.

Guide by the above, modify the length of lumber to be taken.

Inasmuch as the steamer has never been to this side before, and as we have no blue print available, we cannot tell just how long lengths can go in Nos. 1, 3 and 4, because we do not know how far the hatch may be from the bulkhead. However, we believe that the ship will be found to be a fair lumber carrier, and as we are very anxious that this business should be mutually satisfactory, we shall do everything we can to expedite the loading, and to merit your continued favors.

We understand that the vessel will be loaded by stevedores satisfactory to your goodselves, and that the rates to be paid will be the usual rates for that class of work.

Will you be good enough to make up a charter party based upon the foregoing, and send up as many copies as you require to be signed. We will require four copies for our own use.

If there is anything unprovided for, or not clear to you, please telephone Tuesday morning.

I intend to come down to Portland some time

during the next week or ten days, and shall be glad to call upon you.

Yours truly,

OSAKA SHOSEN KAISHA,

Edwin Orrett, Local Manager.

O/W
Encl.

P. S.—Unless you have a marine surveyor in mind at Portland, who could survey the vessel and grant certificate, we would prefer to have the survey made up here by Capt. James Fowler, representing Lloyd's Register of Shipping, but inasmuch as a further survey will have to be made after the vessel is loaded, it will be better, perhaps, to have both surveys made at Portland. We will be guided by your wishes in this matter. E. O."

Mr. Wood: This is a letter of the next day, which I asked counsel to produce, and I will offer it in evidence and read it.

Same objection.

Objection overruled. Exception allowed.

Marked "Libelant's Exhibit F," and reading as follows:

"Portland, Oregon, March 20, 1917.

Edwin Orrett, Esq., Manager,

Osaka Shosen Kaisha,

Tacoma, Washington.

Dear Sir:

Your full and interesting letter of yesterday at hand with enclosure, and we are sending you here-

with eight signed copies of the charty party of the 'SAIGON MARU' asking you to sign and return to us four of the same. Your letter, supplemented by the telephone conversation of this morning, gives us all the information we wanted about the ship. The fact of her having no hatchway longer than 24 ft. is against her taking any large quantity of lengths over 45 ft. under deck, although she should carry quite a number of 50 to 55 ft. pieces in No. 1, 3 and 4, but it will be very simple to have the different lengths so sorted on the dock or in the water that all the lengths that can go into the hatches will be put there and the longer ones placed on deck. We shall have this done and we shall also have small lots of stowage placed on the dock immediately behind the piles of timber and plank so that they can be availed of by the stevedores when required without any delay whatever. With such long notice we see no reason why the ship, unless she should prove to be of particularly complicated construction should not be loaded at the rate of 500 M ft. per working day, but in order to do this we must have stevedores with whom we can work in perfect harmony. Brown & McCabe are our people, and of course they will ask no more than current rates, beside which we think they can satisfy you when you come over here that no one can do any better than they can in the way of dispatch. It is of course for the interest of the owners (as of ourselves but to a much smaller extent) that the ship carries as large a cargo as possible, and to

that end we suggest that she take no more coal than a reasonable amount to carry her over to the nearest Japanese coal port, with a suitable allowance, of course, to cover contingencies. We mention this matter now, so that you may consult with the owners if you think advisable, as Japanese captains are very likely to insist on an unnecessarily large quantity of fuel. The owners might perhaps instruct the master in this case to take only as much as he thought best, acting under the advice of yourself, the Marine Surveyor, and Lloyd's Agent. We think the survey will have to be done here as the certificate must set forth the steamer's condition at time of readiness to receive cargo. We have inserted May 10th as the date before which laydays are not to begin, which we suppose will be satisfactory to you, as you expect her to arrive here only on the 20th of that month.

Will you be kind enough to send us the schedule of the 'SAIGON MARU' showing expected sailings from Singapore and other ports—the one you gave the subscriber over the telephone?

If you have any other steamer that wants business to India, either Bombay or Calcutta, please let us know as we might be able to work another cargo.

Yours faithfully,
PACIFIC EXPORT LUMBER CO.,
By Wm. D. Wheelwright, President.

Enclosure: Eight signed charter parties of S. S. 'SAIGON MARU.' "

Q. I would like to ask you, Mr. Wheelwright, why you did not specifically in your reply decline, in express words, Mr. Orrett's suggestion in the previous letter that they would take on deck as much as was allowed by the ship's officers?

Objected to as incompetent, irrelevant, and immaterial; the correspondence will speak for itself. It would be incompetent for the person who has written a letter or signed any sort of document, to explain the reasons for omitting to deny or refuse, or to say or not to say anything in the letter.

Court: I think the letters should speak for themselves. I do not see how he can explain anything in it. This correspondence has been introduced for the purpose of putting the court in the position of the parties at the time they concluded the charter, and I think that the letters themselves are pertinent for that purpose. But I think the correspondence will explain itself, and it is not proper to explain it outside—explain what was intended by the correspondence.

Mr. Wood: Oh, your Honor, that is a misapprehension. We do not ask to say what was intended by the correspondence. That is not it at all. But your Honor just said that you wanted to be placed in the exact situation of the parties when they entered into the charter party. Now, it is just as necessary for your Honor, in order to be

placed in that situation, to hear what Mr. Wheelwright might have to say as to read the letters. They have just now stated that his silence in that letter amounted to an acceptance of that condition. Now, after a statement like that, it is certainly his privilege to say what he may want to say about it.

Court: I understand that this correspondence is all merged in the charter party, and that correspondence is admitted to show the position of the parties. I do not see much use of this evidence, but I will permit it to go in over the objection, if you want to introduce it.

A. I should not want to say a word about the letters at all, only for Mr. Huffer's statement that my silence meant consent. Well, it didn't. That is all I want to say.

Mr. Huffer: I wish to make another objection, your Honor: That what was in Mr. Wheelwright's mind when he wrote that letter was not communicated to Mr. Orrett.

Court: I understand your position about that, as to what the witness might say as interpreting his own correspondence; the correspondence is for the interpretation of the court.

Mr. Hayden: If you Honor please, the court is admitting this, as I understand it, for the purpose of placing itself in the position the parties occupied prior to entering into the charter party.

Court: Yes.

Mr. Hayden: Now, it is self-evident that, if

you are trying to get into Mr. Orrett's position, Mr. Orrett is absolutely unable to understand what Mr. Wheelwright may have intended by writing a letter if he does not express it, so that the testimony proposed to be drawn out from Mr. Wheelwright in this regard could not be anything that would affect Mr. Orrett's mind.

Court: I will let that go into the record for the purpose of making a record of it. The Court of Appeals might take a different view of it, and therefore, in order to get the whole matter before the court, I will permit it to go in.

Mr. Huffer: We save an exception.

Q. Have you expressed yourself fully on that, Mr. Wheelwright?

A. We were all talking together. I don't know whether I did or not. All I said was, I don't want to say anything to explain that letter. It was only because Mr. Huffer stated that my silence on that point was a concession of approval of that point. I merely want to say it was not so. With that letter went the charter party from which that condition was omitted; charter party in which that condition did not appear; and that was a sufficient reason for my saying nothing about it in the letter.

Q. I will show you this paper, and ask you if that is the charter party?

A. That is the original charter party made up in our office.

Mr. Wood: I offer that in evidence.

Received without objection, and marked "Libelant's Ex. G."

Mr. Wood: Now, this is the document, your Honor, that I think we are all agreed did merge the previous correspondence.

Court: That is the document you read from in your opening statement?

Mr. Wood: Yes, your Honor.

Court: Is it necessary to read it now?

Mr. Wood: No, your Honor, I don't care to. I want to read certain portions of it into the record, but I have already read them to you, and I can do that at a later time.

Court: Very well.

Q. I show you a letter dated April 26th, from Mr. Orrett to the Pacific Export Lumber Company, and ask you if that relates to that same business.

A. Yes, that is on the same subject.

Mr. Wood: I will offer this letter in evidence.

The letter is marked "Libelant's Exhibit H," and reads as follows:

"Tacoma, U. S. A., April 26, 1917.

Refer to File No. 525-1.

Pacific Export Lumber Company,
1004 Chamber of Commerce Bldg.,
Portland, Oregon.

Dear Sirs:

S. S. 'SAIGON MARU' VOYAGE 1—

Referring to conversation of the 24th, relative to

S. S. 'SAIGON MARU,' take pleasure in notifying you that our principals, under date of March 14th, advise that the ship is to be loaded at Portland with a full cargo of lumber for Bombay. Deck loads to be handled as much as safety of steamer permits; one coaling port in Japan for replenishment of her coal bunkers. With regard to the coal to be taken on here, we are fully in accord with your idea, namely that only sufficient coal should be loaded as to take the ship to the coaling port in Japan with a proper margin for safety.

We shall, of course, have to be guided by the wishes of the Captain, and also by the Surveyor for Underwriters, who we will expect to look closely into this detail.

We also understand that the deck load will be stowed under the supervision, and with the approval of a marine surveyor at Portland. With regard to pilotage, Captain Bailey advises that he had intended to call for the service of Captain Smith as river pilot, who is preferred by him to Captain Sandstrom, although the latter is considered to be a good pilot.

He prefers the services of Captain Staples as bar pilot, and will arrange with him subject to the approval of this office.

If you know anything against either of the men suggested please let me know at once. Thanking

you for the courtesy extended to the writer at Portland, we are

Yours truly,

OSAKA SHOSEN KAISHA,

O:HN

Edwin Orrett, Local Manager."

Mr. Huffer: Under the ruling that the Court has made I don't know that it will be necessary to take these same objections, but this is being introduced for the purpose of showing what the attitude of the parties was toward each other.

Court: I will overrule the objection the same as before.

Exception allowed.

Q. I show you a letter, Mr. Wheelwright, dated May 23rd, to you personally, signed by Mr. Orrett, and ask you if it relates to this same business.

A. It does.

Mr. Wood: I offer it in evidence.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Exception allowed.

Marked "Libelant's Exhibit I," and read as follows:

"Tacoma, U. S. A., May 23, 1917.

Refer to File No. 525-1.

PERSONAL.

Mr. W. D. Wheelwright,

C/o Pacific Export Lumber Co.,

Portland, Oregon.

My dear Mr. Wheelwright:

This will introduce to you Captain Y. Yano, who

represents this company as port captain. I have instructed him to proceed to Portland with S. S. 'SAIGON MARU,' and to remain with the steamer as long as is necessary to superintend and help, so far as possible, with the loading. Captain Yano is fully advised as to my wishes, especially with regard to the amount of deck cargo to be carried.

At the present time, the captain of the steamer asks that only about 175,000 feet B. M. shall be loaded as deck cargo. This, I believe, would be too small a quantity, and I will leave it to you, and the stevedores to try and convince Captain Yamamoto otherwise.

Any attention that you are pleased to show Captain Yano, while at your port, will be highly appreciated by me.

Yours very truly,

O:HN

EDWIN ORRETT."

Q. Mr. Wheelwright, I hand you a night letter, dated San Francisco, May 31st, from Mr. Orrett, and ask you if you received that.

A. Yes. I remember it well.

Mr. Wood: I offer this in evidence.

Objected to as irrelevant and immaterial, and also as incompetent, on the ground that the construction of any opinion about the capacity of the ship to take cargo or to take a deck load, or the quantity of the deck load, is a matter of expert opinion, for which Mr. Orrett has not shown himself qualified. In fact he has stated in the letter

introduced in evidence already by Mr. Wood that he knows very little about this matter of loading such cargo, and disclaims any expert knowledge of such matters.

Objection overruled. Exception allowed.

Marked "Libelant's Exhibit J," and read as follows:

"San Francisco, May 31—17.

Pac. Export Lbr. Co.

Portland, Ore.:

Leave Thursday on Beaver advise captain will expect him to load up to the capacity as indicated by marine surveyor and approximately seven hundred and fifty thousand feet on deck.

EDWIN ORRETT."

Q. The ship is not mentioned here, but this refers to the 'Saigon,' does it not?

A. The 'Saigon Maru,' yes.

Q. Do you recall, Mr. Wheelwright, how much cargo the 'Saigon Maru' did carry?

A. Well, it is right here.

Q. It is already in evidence?

A. Yes, it is already in the bill of lading.

Mr. Huffer: We are agreed as to the amount.

A. 2,678,410 feet altogether; under deck about 2,436,851. These are in your captain's statements. And on deck about 241,559.

Mr. Huffer: That is correct.

Q. Mr. Wheelwright, you have already stated

that you have been in this export lumber business some 25 years. That was at this port, was it not?

A. Twenty-three.

Q. Twenty-three years at this port?

A. At this port.

Q. Tell the court, please, what is the custom of the port about loading deck loads of lumber.

Mr. Hayden: Objected to on the ground that the custom of the port has absolutely nothing whatever to do with loading on a particular ship which is chartered to take a particular cargo or a general cargo. The custom of the port might have something to do with dispatch of a vessel, terms, order in which she might load—things of that kind; but the court knows that each ship has its own peculiarities. The parties here went into the charter party with regard to this ship, which says the ship shall take a full cargo of lumber on and under deck, which means a full cargo of lumber for this ship. Whether some ship of different construction, different size, different decks, different draft, and all those things may take a certain quantity of lumber is something we cannot go into, I think, in this matter. We object to that as entirely immaterial and incompetent.

Court: Do you confine yourself to port custom or general custom?

Mr. Wood: The decisions are express, your Honor—I can bring them here if you would like to see them, that full and complete cargo means ac-

cording to the custom of the port of loading. I therefore want Mr. Wheelwright to inform your Honor about the custom of the port here as to loading deck loads on vessels. I want him to give general illustrations of loading of deck loads on vessels here, whether that is a uniform custom here, and then I want him to express his opinion as to what would have been a full deck load for this ship. There is no doubt whatever under the authorities that a full and complete cargo means according to the port from which the vessel is to take the cargo, naturally, could not mean anything else.

Court: Would that vary the rule as to the capacity of the ship, the proper loading of the ship—the custom of the port have anything to do with that?

Mr. Wood: As to the proper loading of the vessel?

Court: Yes.

Mr. Wood: Yes. I don't mean that the custom of the port would allow the vessel to be improperly loaded; but I do mean that when a charterer at this port contracts for a full and complete cargo to be carried on the vessel, he means as is usually carried by vessels out of this port, and he has a right to rely that this vessel that is coming to him will carry a full and complete cargo out of this port as all other vessels do that leave this port.

Court: Is that custom of the port or is it general custom?

Mr. Wood: That is custom of this port relating to vessels loading.

Court: That would be governed then by the capacity of the ship and the man loading.

Mr. Wood: Certainly every ship does not take the same deck load. Some take 600,000 feet, some take double that. It does depend on the dimensions and the size of the ship. After Mr. Wheelwright states the general practice and custom in the lumber trade in loading vessels out of this port, I then might ask him what would have been a proper deck load in his opinion for this particular vessel, considering her dimensions.

Court: This witness is a witness of large experience in loading vessels for foreign ports, and the court is inclined to hear him upon that line, but I doubt very much whether that is controlled by the custom of the port.

Mr. Wood: Well, your Honor, as long as you are going to admit the evidence now, I will go ahead, and I will produce the authorities at a later date.

Adjourned until 10 A. M.

Portland, Oregon, December 13, 1919. 10 A. M.

WILLIAM D. WHEELWRIGHT resumes the stand.

DIRECT EXAMINATION—Continued.

Q. At the adjournment I was asking you what

the custom of the port was as to loading full deck loads, Mr. Wheelwright.

Mr. Huffer: We objected to the question on the ground it was immaterial and irrelevant.

Court: Very well. You said you would bring authorities this morning, Mr. Wood.

Mr. Wood: Yes, I will, your Honor. I will say that I do not regard this custom as necessarily vital to us in the case. If there were no custom we could show that this ship did not take a full deck load.

Court: I stated yesterday evening that my impression was that the custom did not extend to that point, but you might examine, if you wish, under the rule with regard to loading custom.

Md. Wood: The authority I refer to is Scrutton on Charter Parties and Bills of Lading, which is a very leading authority, as your Honor knows, 7th edition, article 46: "Full and complete cargo means full and complete cargo according to the custom of the port of loading."

Court: Very well. I understand. You may proceed with the examination.

Mr. Huffer: Exception.

A. The question is?

Q. What is the custom of this port as to what is a full and complete cargo, including deck load, on these steamers.

Mr. Hayden: I want to object on the ground that the witness has not shown himself to be qual-

ified with respect to any steamer of the same character and quality as the "Saigon Maru."

Court: Objection overruled. You may proceed.

A. The custom of this port, which I have known for the 23 years that I have been here in that business, handling a great many ships of similar type and construction to this ship, is without any doubt that they take as much of a deck load as is possible under all the circumstances. There are a good many circumstances that enter into that. In the first place, the captain has some say about it. His opinion, of course, is to be regarded, because he has the safety of lives that he is responsible for. The marine surveyor is an authority we defer to in a great measure. And then as the ship is loaded they watch her to see if she is tender. And the custom undoubtedly is to take as large a deck load out of the port as is considered safe by the best authorities.

Court: That does not extend—I am just asking for information, not to affect this case—that does not extend to custom of a single port, does it—what I was trying to get at last evening?

Mr. Wood: I think that is the general rule, yes, wherever ships are engaged in a commerce one of the essentials of which is to carry a deck load as a part of the cargo, and that is the kind of commerce involved in this case. These lumber cargoes could not be shipped to the Orient at a profit unless the vessel carried a full deck load.

Court: Very well. Go ahead.

Q. Mr. Wheelwright, are you prepared to state approximately the height of deck load that vessels ordinarily take out of this port, or is that more a question for the surveyors?

A. Oh, I know about that.

Objected to.

A. Let me qualify. I have been in business here for 23 years, and my business from 1899 to 1914 was in loading ships of which we were the time charterers, where we stood in the position of the real owner, and it was the study of those 14 years to handle those ships to the best advantage from the owner's point of view.

Court: You inspected those yourself?

A. Oh, constantly; constantly. When I first began I went all over every ship, and even went down and looked at the machinery. I examined the hatches and the various compartments, and negotiated with the stevedores as to how they could be loaded to the best advantage; and I think I qualify myself almost to say that I was an expert on loading ships. My business life depended upon it. We took these ships on time charter. If we didn't handle them economically, if we didn't load them properly, we were losers. All the profit we made was in handling ships with lumber.

Mr. Hayden: My point is this: We have to confine ourselves in this case to ships that were of the same construction throughout as the "Sai-

gon Maru," in order to show custom to affect the "Saigon Maru."

Mr. Wood: I am coming to that, your Honor. I thought it might be helpful to the court, Mr. Wheelright, if he knew approximately the height to which you loaded vessels with deck loads out of this port. Then we will come to the specific type of the "Saigon Maru" later.

A. The height of load depends a great deal on the ships. We have had a great many ships of almost the same construction, same dimensions, and same power as the "Saigon Maru." It is a very common type. And they loaded deck loads all the way from six hundred to six hundred and fifty thousand up to over a million.

Mr. Huffer: Objected to, and move that the answer be stricken, on the ground it is incompetent, irrelevant, and immaterial, because it becomes necessary to know all about these other ships, to make the same investigation with the same particularity with reference to every ship which the witness has in mind that we are making with reference, or will make with reference to the "Saigon Maru." We will have to go into every detail of construction, peculiarity of every ship—matter, of course, upon which we are not prepared to meet any testimony, and it comes within the rule which is recognized by the courts in cases with reference to other subject-matters of controversy, that particular pieces of property, their value or anything else, or the strength of a particular machine—it comes up most

frequently in the matter of property—cannot be given as primary, substantive evidence, because that involves an inquiry into each particular example that is cited. The example is of no value unless we know all about the example, that is, the subject-matter that is taken as an example, because one difference, one variation of any one of these ships from the "Saigon Maru" would make the citation of such an example wholly irrelevant.

Court: I suppose he can inquire about the general rule, and then go into the particulars. The objection will be overruled.

Exception allowed.

Mr. Hayden: It is customary, I suppose, for exceptions to be noted?

Court: You may have your exception to all this testimony without further objection, if you desire.

Mr. Hayden: All right, with that understanding.

Mr. Huffer: We may have an exception to this whole line of testimony?

Court: Yes.

Q. You stated, Mr. Wheelwright, in answer to the last question the approximate amount in board measure of feet deck cargo; but could you state approximately the heights to which these cargoes are piled on the deck?

A. Yes, the heights of deck loads going out of here vary between, I will say a minimum of nine feet to a maximum, perhaps of fourteen, or even

higher than that, ships of this general class, the same type as the "Saigon Maru."

Q. You said that you had loaded many ships of this type, and dimensions almost identical with the "Saigon." I will ask you if you prepared a list of such ships, showing a comparison between them and the "Saigon Maru."

A. I have.

Q. What did you prepare that list from?

A. Well, we have a large number of shipping books, as we call them, that I brought up to court for reference if desired, which contain all the ships that we loaded from the time we began time chartering in 1899 up to 1914. And I took one of those books at random, No. 5, and looked it over. It seemed to me it would be about an average of what we had been doing, and my tabulated list is out of that book No. 5, which is here, and the others are all here, so they can be examined if anybody wishes.

Court: Are these Japanese ships or different ships?

A. There are some Japanese, but generally they are not Japanese. Generally they were British and other owners.

Mr. Wood: This ship, your Honor, was a British ship, British built, and purchased later by the Japanese. It is not a peculiarly Japanese type. That is not in evidence. That is a fact, however, is it not, Mr. Wheelwright, this was a British ship?

A. Well, I believe so.

Court: "Saigon Maru" is a Japanese name.

Mr. Hayden: I think she was built in Great Britain, if your Honor please.

Mr. Wood: She was formerly known as the Alleghany.

A. Oh, yes, Alleghany. She was a British ship, built in British yards.

Q. I hand you this paper, Mr. Wheelwright, and ask you if that is the list that you made up.

A. This is the list, and I made it up myself.

Mr. Wood: I will offer it in evidence.

A. The books are there if they want to look at them.

Mr. Wood: Yes, the books, of course, are here from which that is made up, if counsel wishes to inspect them.

Mr. Hayden: We make the same objection, if your Honor please, to all of this.

Mr. Huffer: And especially object on the ground of involving the particular investigation of each one of these examples, and on the further ground that it is not stated specifically that the voyages upon which these vessels went, and the time of the year, all the other circumstances similar to that under which the "Saigon Maru" made her voyage.

Court: Let me see that.

Q. These ships on this list, Mr. Wheelwright, were all ships going to the Orient, were they not?

A. I would have to look to see that. I think they were.

Mr. Wood: I might have that book, No. 5.

Court: These are all ships that had been loaded heretofore and sent to their destination from this port.

A. Yes, sir.

Court: The objection will be overruled.

Mr. Huffer: We object to its being received as substantive evidence of anything except this list of ships. We object to its being received as evidence of the statements contained in it.

Court: Is that statement of record?

A. Yes, I have testified to that.

Court: Is it a public statement of record?

A. When we take up a ship we put down a full description of it.

Court: Are these all kept?

A. Oh, yes, every one of them, in all these books.

Court: I will overrule the objection.

The paper is marked "Libelant's Exhibit K," and reads as follows:

v. Pacific Export Lumber Company

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Name of Vessel	Tonnage		Dimensions	Cargo Carried	Under Deck		On Deck	
	Gross	Net						
SS "Elm Branch," Dalny & Taku, April.	3265	2065	340 x 45.5x 26.9	2,785,032	2,183,255	601,777		
SS "Oakley," Dalny, July.	3798	2456	340 x 49.5x 25.6	3,076,701	2,325,073	751,628		
SS "Eva," Tsingtau, Shanghai.	3231	2084	330.8 x 45.5x 23.9	2,580,601	2,146,689	433,912		
SS "Sandhurst," Taku, July.	4298	2768	375 x 46.5x 22.4	2,912,425	2,463,283	449,142		
SS "Ilford," Taku, August.	4264	2789	360 x 48 x 28.1	3,367,271	2,759,339	607,932		
SS "Comeric," Taku, September.	3980	2594	344.6 x 49.8x 25.8	3,217,820	2,469,583	748,237		
SS "Volga," Tsingtau	4404	2851	370 x 49.9x 27	3,560,631	2,940,456	620,175		
SS "Tottenham," Shanghai, Manila.	4494	2943	370 x 50.5x 28.2	3,647,631	2,793,323	854,308		
SS "Sutherland," Tsingtau	3542	2277	340 x 45.7x 24.6	2,760,898	2,229,466	531,432		
SS "Oceano," Tsingtau	4657	3050	367.7 x 52 x 29.11	3,806,402	3,027,016	779,386		
SS "Albenga," Taku	4249	2769	360.2 x 48.2x 28.3	3,155,140	2,606,144	548,996		
Total.	44182	28646	3897.11x530.3x289.11	34,870,552	27,943,627	6,926,925		
Average.	4016	2604	354.4 x 48.2x 26.4	3,170,050	2,540,329	629,720		
SS "Saigon Maru"	4354	2740	354 x 50.3x 28.2	2,678,410	2,436,851	241,559		

OR TAKING FOUR STEAMERS OF ALMOST SAME DIMENSIONS AS "SAIGON MARU" RESULT IS AS FOLLOWS:

Name of Vessel	Tonnage		Dimensions	Cargo Carried	
	Gross	Net		On Deck	
SS "Oakley"	3798	2456	340 x 49.5x 25.6	751,628—26.38%	of total
SS "Tottenham"	4494	2943	370 x 50.5x 28.2	854,308—22.50%	of total
SS "Comeric"	3980	2594	344.6 x 49.8x 25.8	748,237—23.25%	of total
SS "Volga"	4404	2851	370 x 49.9x 27	620,175—17.42%	of total
Total	16676	10844	1424.6 x 199.3x 106.4	2,974,348—89.55%	of total
Average	4169	2711	356 x 50 x 26.6	743,587—22.39%	of total
SS "Saigon Maru"	4354	2740	354 x 50.3x 28.2	241,559—9.02%	of total

Q. When you charter a ship to carry lumber it is necessary for you, is it not, to ascertain the dimensions of that ship to determine what cargo you can load in her?

A. Of course.

Q. And you therefore keep a record of the dimensions of every ship you load, do you not?

A. Absolutely—every point that we can get hold of. For instance, the Tottenham we put her down from Lloyd's books 370 feet long, 50 feet 5 inches beam, and 28 feet 2 depth of hold; 4,494 tons gross, 2,943 tons net; cubical capacity in feet 384,848, and the tons dead weight; that is the basis we go on with every ship; we get all those particulars, and then we can figure from our list about what the ship ought to carry.

Q. Will you ascertain whether those ships were all ships going from here to the Orient or Japan?

A. Yes.

Q. Can you state?

A. Just a minute. They all went across the Pacific to the Orient, and some might have gone beyond. I cannot tell without looking them all up.

Q. Can you tell the time of year they went? You see counsel has interposed an objection that this comparison is not correct unless we show the voyage they went on.

A. Well, I can tell the time of year of every one of them.

Q. And the destination?

A. Yes. Well, shall I state that at length. The

Elmbranch, for instance, left here in May. I can mark them all down here if you will give me a pencil. It will take some time; but I will do it.

Court: Also while you are marking that down, did any of these ships go to Bombay?

A. None of them. No, none of these went to Bombay.

Court: I think you better take the time to mark that down afterwards.

A. All right. I will mark them all down later.

Mr. Huffer: In view of the witness's statement that none of these ships went to Bombay, we move to strike the list as immaterial and irrelevant.

Motion overruled.

Q. Mr. Wheelwright, when you chartered the "Saigon Maru," of course, as you just testified, you looked into her dimensions, as you do all ships?

A. Yes.

Q. How much of a deck load should she have carried?

Mr. Huffer: Object to that. He has not given any data on which to base any opinion.

A. I can give it. I have it.

Mr. Huffer: Which pertains to the "Saigon Maru," and he does not show that he is qualified therefore with respect to the "Saigon Maru" to make any statement in regard to what she ought to have carried.

A. If you will let me answer the question I will show you the "Saigon Maru" had a gross tonnage of 4,354 against an average of the four ships almost

exactly like her of 4,169. She had a net tonnage of 2,740 against an average of the four ships like her of 2,711. Her length was 354 feet against the average length of the others of 356. Her breadth of beam was 50 feet 3 against an average of 50 in the case of the other four. The depth of hold is 28 feet 2 against an average of 26.6 in the other four, and she carried a deck load of 241,559 against an average of the other four of 743,587. I would explain with regard to this memorandum, I first took all the ships in the book, eleven, and got the average of the whole, which was not very different from the figures that I have read. Then I picked out four of almost exactly the same dimensions, same length, same beam, same depth of hold, and same gross and net tonnage, almost exactly the same, as is shown by the averages. The four average a little shallower than the "Saigon Maru"; they average a little narrower. They average only two feet longer in 354, and the gross and net tonnage was almost exactly the same.

Q. Would your answer then be that this vessel could have carried in the neighborhood of seven hundred and forty to seven hundred and fifty thousand feet on deck?

A. She should.

Objected to on the ground the witness has not shown himself qualified; he has not shown he has had any experience in navigation whatever.

Court: The objection will be overruled. I will allow the testimony to be taken. You may answer.

A. Yes, she should have carried a minimum of 750,000 feet at that season of the year, which was the favorable season. I think it was May that we loaded her, and, judging by what the others have carried, and judging by the ship herself, which I saw several times and could compare her with other ships of similar dimensions, she should have carried a minimum of 750,000 feet. We hoped to get on more than that.

Q. Can you state, Mr. Wheelwright, how much lumber in board feet equals one ton? I want that for information because Captain Yamamoto testified it took 480 feet B. M. to equal a ton. I don't know.

A. That equals a ton measurement.

Q. What?

A. That is the ton measurement, ton measurement is 40 cubic feet, and that is 480 feet board measure. A ton weight—this lumber weighs about a ton and a half or a little more.

Q. To the thousand feet?

A. To the thousand feet.

Court: About 3000 pounds.

A. Well, board measure, one thousand feet board measure would weigh about 3000 pounds—from 2800 up to 3300 according to the peculiarity of the lumber and partly of the season of the year. We figure roughly about 3000 pounds; in the winter we figure 3300.

Q. Now, Mr. Wheelwright, in chartering the "Saigon Maru," state whether or not you chartered

her with special reference to the sale of this cargo in Bombay.

A. Oh, yes, the sale was based on this ship of Mr. Orrett.

Mr. Huffer: Objected to. The witness did not give an opportunity to object before he answered.

A. Certainly; excuse me.

Mr. Huffer: I object to the witness testifying orally as to the circumstances, as not the best evidence, and also object on the ground that the sale in Bombay is immaterial and irrelevant.

Court: That is the port of delivery.

Mr. Huffer: Yes, your Honor.

Court: I suppose the charter party gives the beginning and termination of the voyage as Portland to Bombay.

Mr. Huffer: Certainly.

Court: You are offering this testimony to fix the measure of damages.

Mr. Wood: Yes, your Honor.

Court: The objection is overruled.

Q. The ship was chartered with special reference to this sale in Bombay, was it not?

A. Oh, yes.

Q. And to whom had you sold in Bombay?

A. Well, we didn't sell the lumber in Bombay finally, until we got the ship. We had a firm offer from Bombay, as stated in the testimony there, and as we wrote Mr. Orrett it was on the strength of that offer that we made him the offer for the ship, and then cabled the people in Bombay accepting the

offer that they had made us, which we were able to do by means of having chartered this ship.

Mr. Huffer: Object to his stating orally what is evidently, and which he states is, embodied in cablegrams. I think the cablegrams are the best evidence.

Mr. Wood: I don't think we have them. We would be very glad to get them.

Q. You can produce the cables?

A. Oh, yes. They are all at hand if you want them.

Mr. Huffer: We insist on their being produced.

Court: Very well. You may produce them.

A. I can produce the cables we received and copies of the cables that we sent to them.

Court: Very well. Do that.

Q. To whom did you sell in Bombay?

A. Gillanders, Arbuthnot & Co.

Q. As I understand it you got what you call a firm offer from Bombay, that is a tentative offer, and then a tentative offer of the ship, and then when you found you could get them both, you closed with both?

A. I think we had a firm offer from them. I think it stated in letter to Mr. Orrett that we had a firm offer.

Objected to on the same ground, that the cablegrams which showed these negotiations are the best evidence.

A. Well, I will bring them in, Mr. Huffer. I

can stop and go down and get them now if you want me to.

Court: I think you better go on with the testimony and then produce those later.

A. I will bring them up this afternoon after the noon recess.

Q. The objection I think has thrown us off the track a little. What I meant was that you got a firm offer from Bombay and a firm offer from the ship, and when you found you could close with both, you took both?

A. That is my recollection, but the cables will show it. I will have them all here at 2 o'clock.

Q. I suppose the cables will also show the terms of the contract as well, will they not, or the letters following?

A. Well, the correspondence shows it, but I don't know that the cables do; they may but that is not important, as I see. We were to draw ninety days' sight, or something like that, on London.

Court: Did you sell it at market price at Bombay, or at a specific price?

A. Oh, a specific price, they made an offer as I recollect, the cables show they made a firm offer for the cargo not to exceed 4,000,000 feet, something like that.

Court: At a certain price?

A. At a fixed price. When we got this ship we found we could do it.

Mr. Wood: I will show the terms of the contract and sale when we get to it.

Court: Very well.

Q. It is important, Mr. Wheelwright, to show that we did not fulfill those terms, did not furnish the requisite amount of lumber.

A. Didn't furnish a full cargo; couldn't.

Q. Will you please state what direct loss to you there was in profits on the sale, owing to the failure of the ship to carry a full deck load?

Mr. Huffer: Objected to as calling for a conclusion of the witness both as to the law and as to the facts. If he suffered any loss, the facts should be shown.

Court: I suppose the cablegrams will have very much to do with that, to show the price at which the lumber was sold.

Mr. Huffer: And the additional objection, your Honor, is—I don't know how this is going to eventuate, whether the sale price is going to be less or greater than the market price—but the objection is that that is not the proper measure of damages. The price at which the property was sold, the market price in Bombay would be the measure at that end of the line.

Mr. Wood: I don't know that counsel quite gets the theory of this case, your Honor. We were entitled to claim general damages, which would have been the excess cost to us of transporting this left-behind deck load to Bombay. In the great scarcity of the world's shipping we could have scoured the markets of the world and possibly got a ship, or part of a ship.

A. Yes, space.

Mr. Wood: And we could have sent this deck load over to Bombay, and charged the extra cost to them. In other words, they had sold us transportation; they didn't give it to us; and we could have gone out in the market and bought transportation, and it would have cost them at least \$15,000. Now, instead of taking the larger measure of damages we, with what seems to me the utmost equity and justice, have taken the lesser amount, because that lesser amount is what we actually suffered, and that lesser amount is special damages, and it consists of our own loss of profits, and the amount that we owe Gillanders, Arbuthnot & Co., in Bombay for not fulfilling our contract with them. And those special damages amount to, in round numbers, \$10,000.

Mr. Huffer: The objection is the damages he is seeking to prove are most contingent and speculative.

Court: The objection will be overruled. The court will take care of that in the general argument.

A. Shall I answer the question? You asked me what our loss was.

Q. Yes.

A. Well, I haven't the figures in mind, but it is in the account I made up showing exactly what it was. It is somewhere about a little over \$4000.

Mr. Huffer: I move that the answer of the witness be stricken out as to the \$4000. It is simply a conclusion of the witness.

A. I will correct it in a minute, Mr. Huffer, as soon as I see the account.

Court: The objection will be overruled subject to the production of the account.

Q. This is the memorandum showing the full basis.

A. Our loss was \$4,044.65.

Mr. Huffer: Same objection, your Honor, and move to strike out the answer as a conclusion of the witness.

Court: What statement is that, Mr. Wheelwright?

A. This statement shows we sold so much lumber at Bombay, got so much money for it.

Q. Who is that made up by?

A. Made up by me personally from my own books. It shows what that lumber cost us, original cost, insurance, war risk, and ship broker's; and it shows a profit on the 2,729,005 feet that we shipped of \$21,710.57.

Mr. Huffer: Same objection, and move to strike the answer of the witness as a conclusion.

Court: The objection will be overruled.

A. Now, that meant a profit, figured out a profit of \$7.955 per thousand feet, and we arrived at our loss by taking the quantity which the ship should have carried in excess of what she did carry and multiplying that by 7.955. That is, she was short—we figured she should have carried 750,000; she carried 241,559; the deficit was 508,441 feet, and we multiply that by the dollars representing our profit

per thousand on what we did ship, and the result is \$4,044.65.

Mr. Huffer: It is understood that our objections go to all this testimony.

Court: Yes, very well. Do you desire to introduce that in evidence?

Mr. Wood: Yes.

Court: Well, you better submit it to the other side.

Mr. Huffer: We object to this being offered in evidence, your Honor, because it is not the best evidence of the sale price in Bombay, which depends on the contract in writing between the Pacific Export Lumber Company and the people in Bombay to whom they sold; that the damages claimed in it are remote and not within the contemplation of the parties at the time the charter party was signed. It certainly cannot show a contract which is in writing and then have merely a written resume of the effect of that writing in the opinion of the witness, and we may have further objection as soon as we find out what the statement means.

Mr. Wood: Isn't it clear to you what that statement means?

Mr. Huffer: No, this item here of June 7th, the quantity of lumber at \$11.50 base. What is the meaning of that Mr. Wheelwright?

A. The lumber business has been done for some years on the basis of a list in which all the sizes that are generally used are tabulated, and the base price covers certain ordinary sizes, and then for any

sizes that are more valuable than the ordinary size an extra price is charged in the list; so that we say we sell a man lumber at \$30 basis; it means \$30 for all the lumber in the list that takes the base price, and whatever the additional charges are for other sizes.

Mr. Huffer: Well, what is the meaning of this expression of \$11.50 base? That is, what does that mean in the terms of market price to this particular lumber that was not shipped?

A. Well, it means this: That all the sizes in that schedule that made up our order that are no more expensive than the base price, are billed at \$11.50. Then we will say 1x12 is worth \$2 more, that is billed at \$13.50; and 5 $\frac{1}{4}$ x12 we would say would be worth \$3 more, that would be billed at \$14.50. It is the universal custom now in the export trade to make all transactions on the basis of "H" list, and "H" list shows that certain sizes are sold at the base price, which is \$20, and if the sale is made at \$20 base, it takes the list price right through. If it is made at more or less than that, it takes the additional prices.

Mr. Huffer: Well, how much of this lumber that you claim was not shipped had you sold at or less than \$11.50 base price?

A. We didn't sell any of it at \$11.50. We sold the whole of it at a price in sterling for the load.

EXAMINATION BY MR. HUFFER:

Q. What I mean is, what was the market price at Portland at the point of loading, on shore?

A. Well, as far as we know, it was the price we paid. We paid the market price, to the best of our judgment, when we bought it.

Q. What was that price?

A. \$11.50 base.

Q. What I am getting at, Mr. Wheelwright, is to have a bill of particulars of the different dimensions.

A. I will give it to you. I can bring it up. But if you will allow me to look at that a minute with you.

Q. Yes. Now, this price that you have stated here, Mr. Wheelwright, on this lumber which you have referred to here after the date of June 7th, under the head of cost and charges, lumber 2,729,005 feet; that is the lumber that was shipped?

A. Yes, sir.

Q. Now, you claim that the lumber that was not shipped and should have been shipped was more valuable lumber.

A. I believe it was. It consisted largely of the longer lengths.

Q. Then this price that you give here would not be a correct price for the lumber that you intended to ship but didn't ship?

A. You mean that they left behind?

Q. Yes.

A. I must look at this again, if you will allow me.

Q. All right.

A. You see it was sold.

Q. So, so far as this lumber that was not shipped is concerned, in fact so far as any of it is concerned, it does not make any difference what the price per thousand of each particular kind was, because it was bought at a base price and sold on the other side at a base price?

A. Yes, so far as we are concerned, that is the fact. As far as our contract with Gillanders, Arbuthnot & Co., it makes no difference whether the less expensive or the more expensive was left behind. Now, one minute. Do you want me to produce Mr. Poulsen's bill?

Q. If you please, yes.

A. I think it was Poulsen's bill.

Q. Now, this "Less $2\frac{1}{2}\%$ twice," that appears in the bill after the same date and the same item, the first item, under the head of "Cost and Charges," what does that mean?

A. That was the terms on which we bought the lumber. We bought it at \$11.50 base less $2\frac{1}{2}\%$ twice.

Q. What does that $2\frac{1}{2}\%$ twice mean?

A. Take $2\frac{1}{2}\%$ off the gross and then take $2\frac{1}{2}\%$ off the $97\frac{1}{2}\%$ per cent that is left.

Court: Why not say 5 per cent?

A. Well, it is a little bit different, your Honor, $2\frac{1}{2}\%$ off \$12 is 30 cents. That makes the next basis

of figuring \$11.70, and you take off $2\frac{1}{2}\%$ of that, you see it makes it a trifle different. That is the custom of the trade. That is all. The lists provide figuring that way.

Mr. Hayden: By doing that you get a little less.

A. We get a little less. The lumber dealers get the best of us, as they always do.

Q. Now, the item of June 7th, the third item of June 7th, \$206,000 @ $\frac{3}{4}\%$. What does that mean?

A. That is the marine insurance.

Q. That is the under deck cargo, is it?

A. Well, it appears to be. The under deck rate was $\frac{3}{4}$ and the on deck rate was $1\frac{1}{2}$; so the insurance cost us $\frac{3}{4}$ of 1% on the under deck, \$206,000, and $1\frac{1}{2}\%$ on the on deck, which was \$20,250.

Q. Now, what does the \$206,000 represent? That is, that represents as I understand it the value at Portland of the lumber under deck?

A. No, it represents the value c. i. f. Bombay. That is at Bombay, plus 10 per cent. The freight was being prepaid, and we had to insure everything.

Mr. Wood: C. i. f. means cost, insurance, freight.

Q. That is, you insured the lumber that you sent across on the basis of the market value at Portland plus the freight you paid?

A. Oh, no, I beg your pardon. We insured it on the basis of the price at which we had sold it plus ten per cent regardless of the cost or the freight, yes, sir.

Q. Plus ten per cent?

A. Plus ten per cent. That is the custom in dealing with foreign clients.

Q. In other words, you insured your prospective profits?

A. Oh, no. We realized our prospective profits when we drew our draft. But the 10 per cent is usual for the benefit of the buyer, so that if the cargo is lost he still gets a profit.

Q. That is, you insured it at the price at which you had sold it plus ten per cent.

A. Yes; yes, sir, exactly.

Q. And the \$20,250 at $1\frac{1}{2}\%$, that is on the deck load?

A. Yes.

Q. Actually aboard?

A. Yes, actually.

Q. On the same basis?

A. Selling price plus ten, yes, sir.

Q. Except that the insurance rate on it was twice as much as the insurance rate on the under deck cargo?

A. Double, yes, sir.

Q. Now, the item war risk insurance, that was taken out as an entirety on both?

A. On the total, including the ten per cent.

Q. It was a flat rate of $\frac{3}{4}\%$?

A. Yes, $\frac{3}{4}\%$.

Court: Is that in addition to the ordinary risk?

A. In addition to marine insurance, yes, sir.

Q. Now, the ocean freight, you calculate the ocean freight on this entire cargo of 2,675,597 feet

at 240 shillings per thousand feet, and then below it you say "less ten per cent 120/—."

A. Yes, the charter party—

Q. What is the meaning of that?

A. I will tell you that accords exactly with the charter party which allowed shipment of ten per cent of the cargo in short stowage at half rates. So we figured out the freight on 240 and took off half the freight on ten per cent. Of course, we could have figured 90 per cent at 240 and 10 per cent at 120 with the same result. That amount is the freight that we paid. We prepaid the freight and the exchange was adjusted here.

Q. Now, the item below—let's see, you figure that at exchange $\$4.69\frac{5}{8}$, and reduce the pounds sterling of 30,501 to dollars. Was that on the basis of the exchange then prevailing?

A. That was the current rate that day as ascertained by Mr. Orrett and ourselves.

Q. Now, below that was "Less charter commission on freight: £30501.16/1 @ 50." What is the meaning of that?

A. No, at \$4.86.

Q. I was referring to this.

A. Oh, excuse me. Well, that is a clerical error. That 50 should be 5%.

Q. Five per cent?

A. I should say. Yes, you see the charter party provided for five per cent charter commission, and the freight being 30,501 pounds, the charter commission was five per cent of that, 1,525

pounds. Then the rate is \$4.86 as against these other rates, because the charter party provides that rate, that the commission is to be figured at \$4.86.

Court: I think I understand that.

Q. "Page Bros. 1% brokerage on freight."

A. That is what we paid them under a contract which we had with them to pay that commission on such charters.

Q. What does the 305 pounds sterling represent?

A. Well, it is one per cent of the 30,501. You see, 30,501 pounds, one per cent of that is 305 pounds. We figured the same rate provided in the charter of \$4.86.

Q. So under the head of cost and charges you take your cost price at Portland and add to it the cost of getting the stuff to Bombay?

A. Yes, sir, the freight and all the charges.

Q. I see. And this item, this first item June 7th, 2,729,005 feet at 180?

A. That is 180 shillings per load, and a load is 50 cubic feet. That is 600 feet board measure.

Q. What is meant by "G" list?

A. Well, in talking with you I said the "H" list, because that is in use now, but we bought and sold that according to "G" list, which is the list that specifies base price for certain sizes and an additional price for any sizes of greater value.

Mr. Wood: It was the list then in use.

A. It was for that transaction. It was not in general use. It was in use between Poulsen and us.

Q. That first item, then, is the price at which you claim you sold the goods?

A. Yes. I can bring you the invoice giving all the details, and resulting in that 30,000 pounds, or whatever the figure is. Do you want to see that?

Q. Yes, if you please.

A. I will bring a copy of it, press copy.

Mr. Huffer: And our objection to that, in addition to what we have already stated, is that it is a statement of the conclusion of the witness so far as the result is concerned, and also the special objection that the first item dated June 7th is an item the truth of which can be judicially determined only by the cablegrams and correspondence between the parties, and therefore is not the best evidence.

Court: Very well. This is only a memorandum made up by the witness. I suppose the originals would be the best evidence.

A. They will agree with this exactly.

Court: I think it will be very convenient for the court to have it in evidence. Your objection is overruled.

Exception allowed.

Court: Was the freight paid in advance?

A. Yes, sir.

EXAMINATION BY THE COURT.

Q. That is on the basis of full cargo?

A. No, only on what she took.

Q. Then how did you ascertain what she was going to take before she was loaded?

A. Well, we didn't. This was made up only after she was loaded.

Q. I thought you said you paid transportation in advance.

A. As soon as loaded, in advance of sailing; not in advance of loading.

Mr. Huffer: Now, there is another objection, that these are the valuations, your Honor, upon the lumber that was actually transported to Bombay, and it is claimed that the lumber that was agreed to be transported as they claimed and which was left behind, was the more valuable kind of lumber on account of being 12 x 12 and long lengths, and therefore the cost price at Portland of the lumber that was actually transported would not be a proper basis for determining the market value at Portland of the lumber which they claim we agreed to transport, but left behind, in view of their claim that it was more valuable lumber.

Q. You would have to pay more for that here, would you?

A. As I have explained to the counsel, your Honor, the lumber was bought and sold according to the list, and if we paid more for the lumber here we would get more for it over there. Whether it was more or less valuable, therefore, did not make any difference to us.

Q. You would get about the same rate of profit over there?

A. Oh, get exactly the same, exactly. It is according to the list.

Court: Very well. I understand.

The paper is marked "Libelant's Exhibit L," and reads as follows:

"ACCOUNT SALES OF 2,729,005 FEET DOUGLAS FIR LUMBER PER SS "SAIGON MARU" FOR BOMBAY, INDIA, JUNE 4, 1917.

1917
June 7th—
2,729,005 ft. @ 180/- per load Basis "G" List c.i.f.
Bombay £41971.11/8 @ \$4.68½ U.S.G.....\$196,479.48

COST AND CHARGES

June 7th—
Lumber 2,729,005 ft. @ \$11.50 Base
Less 2-1/2% twice\$34,131.54
March 30th—
Marine Insurance\$ 200.00 200.00
June 7th—
\$206,000 @ ¾%..... 1545.00
20,250 @ 1½%..... 303.75
----- 1,848.75
War Risk Ins., \$226,250.00 @ ¾%... 1,696.88
Ocean Freight—
2,675,597 ft. @ 240/-..£32107.3/3
Less 10%....120/-.. 1605.7/2

£30501.16/1
Ex. @ \$4.69½ on do \$143,244.12
Less Charter Com'm on Fgt.—
£30501.16/1 @ 5% £1525.1/9
Ex. @ \$4.86....\$7411.92
Cstms Clr. Fees 75.00 \$7,486.92

\$135,757.20
Page Bros. 1% Brokerage on Frgt.
£305.0/4 @ \$4.86..... 1,482.38

\$175,116.75
Less 347.84 174,768.91

\$21,710.57
Profit on \$21,710.57 for 2,729,005 ft. = \$7.955 per M ft.
E. & O. E.
Portland, Ore., Oct. 4, 1919
PACIFIC EXPORT LUMBER CO.,
By Wm. D. Wheelwright, President."

EXAMINATION BY MR. WOOD RESUMED.

Q. After so much detail, Mr. Wheelwright, I would like to put in a few words a resume of this. Your profit on the lumber that you did send over was \$7?

A. The profit on the lumber that we sent over was \$7.955.

Mr. Huffer: Our objection is that it is a conclusion of the witness.

Court: I understand your objection. The objection is overruled.

Q. And the vessel left behind according to your contention, 508,441 feet, did she not?

A. That is it, 508,441 feet.

Q. So that if she had taken that amount you would have realized this same profit on that amount, namely, \$7.955 per thousand?

A. Exactly.

Same objection.

A. And the amount is, that figures out \$4,044.65.

Mr. Wood: I want to make a memorandum, Mr. Huffer, of documents that you want produced so we will not overlook them.

A. I have got them: Letters and cables, Inman-Poulsen Lumber Company bill of the cargo, a copy of our invoice of the cargo to buyer. I will bring them up.

Q. Mr. Wheelwright, what would have been the cost of transporting this left-behind cargo by some other ship over and above the cost of sending it on the "Saigon"?

Mr. Huffer: Objected to as irrelevant and immaterial, on the ground that it was not as a matter of fact transported over to fill the order, and therefore it cuts no figure whatever on the measure of damages. The other transportation could be ascertained for the purpose of minimizing the loss, but you cannot prove that for any other purpose.

Court: I understand you are waiving that basis of recovery? You are depending upon the special damages?

Mr. Wood: Correct.

Court: What is the use of going into that?

Mr. Wood: Because I want to substantiate my statement that we are taking the lesser measure of damages; we are acting against our own interest, so to speak, taking the lesser amount. Furthermore, these gentlemen are contending that it is not a case for special damages at all. Now, they cannot escape liability by saying it is not a case for special damages and we cannot have general damages. There must be some measure of damages, and a party is entitled to his compensation by the best measure of damages and the best proof that he can produce. If they wish to say, and if your Honor should sustain their contention, that there are no special damages allowable in this case, we would be glad to fall back on the measure of general damages. We are entitled to our damages by some measure.

Mr. Hayen: If your Honor please, that question is not asked him for the correct measure of general

damages, when he has not shipped his lumber. The correct measure of general damages when he has not shipped his lumber is the difference in the market price between here and there, plus the costs, at the time it should have arrived there. That is our contention.

Court: Isn't that what counsel is now attempting to prove here?

Mr. Huffer: No, he is proving, not the market value, he is proving a special sale. He is proving a sale of these goods in advance, shortly after the execution of the charter party, to this firm of Gillanders, Arbuthnot & Co., as the basis on which he is making his damages.

Court: There is another element comes in there. If the owner of the ship knows or has been informed of the special sale, and that the cargo is to be shipped to meet a special sale upon a special price, that gives him knowledge of the conditions under which the sale is made. Doesn't that fix the measure of damages at what was lost under the special sale?

Mr. Huffer: Yes, your Honor, it probably would, where there is notice of the terms of the sale; but the mere fact that a sale is contemplated I think is not sufficient to charge the carrier with those special damages. The authorities are that there must be a contract already entered into at the time, and the terms of that contract must be known, so that the carrier will know the amount of the risk he is assuming.

Court: That is one reason I have been letting this correspondence go in between the owner and the shipper.

Objection overruled. Exception allowed.

A. It would cost a very much larger sum extra to transport that lumber to Bombay than the amount of damages claimed in this case.

Court: Well, he is asking you how much it would cost.

A. I am going on to say that as near as I can calculate it would have cost—I made some figures on it; it is hard to recollect them now—about \$90 a thousand to transport the lumber to Bombay at the tariff rates prevailing at that time, the schedule rates of the steamers published. But their rates were based on no lengths over 20 feet, and a large proportion of what we had to ship was very much longer than 20 feet, and there is no telling how much it would cost; but taking the minimum it would have cost about \$15,000 extra to ship that lumber.

Court: It would cost you that over and above?

A. Yes, over and above the charter rate.

Court: The charter rate you were given in this case?

A. Yes, sir; and it would have made no difference whatever to us, not one penny. It would only have been that the ship would have to pay more. We should still have claimed our profit and no more, but the ship would have had to pay a great deal more.

Q. Was it very difficult at that time, Mr. Wheelwright, to get space at all?

A. Oh, very hard, indeed.

Q. You have made trips to Japan yourself, have you not, Mr. Wheelwright?

A. Oh, yes, quite a number.

Q. You are familiar with the ports on that side, aren't you?

A. Well, yes, some of them.

Q. What coaling port is there in Japan this side of Nagasaki?

A. Well, the most important coaling port is Muroran, which is on the eastern extremity of the coast of Japan, and five days, for ships of this class, five days nearer Portland than Nagasaki, where she actually went.

Court: That is on the eastern coast?

A. This is on the extreme eastern coast, Muroran is, and Nagasaki is almost on the extreme western.

Court: Going from this way?

A. Yes, going from here. We go west, you know, from here, and the first point we strike in Japan is the eastern coast, and it is five days shorter voyage to that coaling port than it is to Nagasaki, and in all our time charters we coaled at Muroran, because by that means we were able to leave here with five days less coal supply than if we went on to another port; also because we thought it was better coal.

Q. A letter has been introduced by the ship,

Mr. Wheelwright—I am referring to Claimant's Exhibit No. 3. This letter is addressed to Captain Y. Yamamoto, and signed by Pacific Export Lumber Co. "Dear Sir: At the request of your agent, Mr. Orrett, we hereby instruct you to proceed as soon as you are ready to Bombay, India, (via Nagasaki for coal). Your vessel is consigned to Osaka Shosen Kaisha, Bombay." I want to ask you whether you, the charterer, were the one to designate Nagasaki or whether that was designated by the owners as the coaling port.

Mr. Hayden: I think the letter speaks for itself, your Honor.

Court: I will overrule the objection.

A. We had nothing to say about that except to advise and recommend, which we had done, that she go to Muroran; but the owners having decided that she should go to Nagasaki, we simply acted with common courtesy when Mr. Orrett asked us to tell the Captain that that was what the owners wanted him to do, we told him.

Mr. Wood: I will withdraw Mr. Wheelwright and put him on again after he has got that data. I want to ask him some further questions in regard to the Bombay sale. I will put Captain Genereaux on now, for he wants to leave for San Francisco tonight.

EMILE C. GENEREAUX, called as a witness on behalf of the libellant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Wood:

What experience have you had first on the sea, Captain Genereaux?

A. Why, I went to sea when I was 16 years old till I was 30, in both sail and steam, and nine years of that time as master.

Q. You were nine years master of boats, did you say?

A. Yes, sir.

Q. And after that what business were you in?

A. Marine surveyor for the San Francisco Board of Marine Underwriters, located at Seattle.

Q. How long did you occupy that position?

A. Thirteen years.

Q. And after that what did you do?

A. Acted as independent surveyor for a period of four years, situated at Portland.

Q. And later I believe you were connected with the Foundation Company building ships.

A. During that same time.

Q. Oh, during the same time?

A. I held position as Bureau Veritas Surveyor for the District of Oregon.

Q. Did you in addition to representing the San Francisco Board of Marine Underwriters represent any other underwriters, Lloyds' or any others?

A. Yes, sir, in a number of cases I represented the New York Board of Underwriters and Lloyds' also.

Q. Give the court some idea of the experience you have had in loading and surveying lumber carrier steamers going out of the Northwest Pacific ports carrying deck loads.

A. Well, during my 13 years' experience on the Sound, I have surveyed in the neighborhood of 1000 ships, sail and steam, which have loaded lumber out of Puget Sound ports.

Q. In 25 months of your experience you told me you had surveyed a certain number of these lumber carrier steamers. How many was that?

A. My first 25 months as surveyor at Seattle I surveyed somewhere in the neighborhood of 250 sail and steamers, loading cargoes of lumber under deck and on deck.

Q. Will you please explain to the court the purpose of a marine survey; why it is made.

A. Why, the purpose of a marine survey is to issue a certificate of a vessel's seaworthiness, her adaptability to proceed on her voyage, her safe risk for underwriters.

Q. The marine surveyor represents the insurers of a ship and cargo, does he not?

A. He does as an underwriter's representative. An independent surveyor represents either underwriter or owner.

Q. But the underwriter's surveyor determines whether it is safe and proper for the underwriters he represents to insure that ship and cargo for that voyage, does he not?

A. Yes, sir.

Q. At the request of the Pacific Export Lumber Company, the libelant in this case, did you make a survey of the "Saigon Maru"?

A. I did, in the latter part of May, 1917.

Q. Whom did you make it with?

A. In conjunction with Captain Hoben.

Q. Who is Captain Hoben?

A. Captain Hoben is a marine surveyor residing at Portland.

Q. Will you tell the court what you saw when you made that survey as to the condition of the "Saigon Maru," how much she had on deck, approximately, and what condition she was generally in to take more?

A. Found her lying at the Inman-Poulsen Lumber Company's wharf with deckload aft approximately four feet high and forward deck load six feet high, thoroughly secured, lashed.

Q. Four feet high would be just up to about the bulwark of her rail, would it not?

A. Just about. The purpose of our examination was to ascertain whether in our opinion the vessel could carry more lumber on deck. Upon investigation we found that the ballast tanks were entirely full throughout the ship. We requested the master to give us permission to empty out two of these tanks to ascertain the stability of the ship, which he refused. He refused to give us permission to swing the booms out, as is customary, and hang a sling-load of lumber on the end of each boom, to

ascertain the stability of the ship. All these requests were refused.

Q. Before you go on, what was your purpose in wishing one or two of the ballast tanks emptied?

A. In loading ships, from my experience—I think you will find the same with all surveyors—we have at least two tanks empty prior to loading or during loading. As the vessel progresses, if we still find she is stiff, it is not necessary to fill these tanks. If we find during loading that the vessel becomes a little tender, we may fill one of them. And I have found in all my experience that it is a very rare occasion for a vessel to go out with full tankage. I have a number of vessels that I have taken at random that have loaded on the river here that will show in all these instances considerable reserve water, with average deck loads.

Q. What does that mean, reserve water?

Mr. Huffer: We object to the testimony concerning specific vessels, on the ground it becomes necessary to enter upon an investigation of each particular instance. We have no means of combating the testimony. But the principal objection is it is impossible for testimony of that kind to be any safe guide to the court, because there are so many peculiar features about each vessel, and it would be necessary to make an exhaustive examination of the characteristics of each one of those vessels, as will have to be made in this case into the characteristics of the "Saigon Maru"—a thing that is prohibited in this proceeding.

Court: The general statement is sufficient for your purpose.

Mr. Wood: I think so, yes.

Court: What were you going to say about the reserve water? You say it is very seldom they do something without reserve water or with reserve water. I didn't catch it.

A. I said it was very seldom that a steamer went out without at least one or two reserve tanks.

Q. That means empty tanks?

A. Empty tanks.

Q. Did the captain's refusal to empty his ballast tanks at the time of your survey inconvenience you in making your test?

A. It absolutely did. He absolutely refused to lend us any aid whatsoever, advising that he would not allow any more deck load to be placed on his ship.

Q. What reason did he give?

Objected to as immaterial.

A. He said it would interfere with his steering rods.

Mr. Hayden: I say I think this is immaterial, conversation with the captain as to the reasons he refused to permit a certain thing to be done.

Court: I suppose conversation with the captain would be pertinent. He represented the ship. The objection will be overruled.

Exception allowed.

Q. Did he give any other reasons besides fear for his steering rods?

A. He said his ship was tender.

Q. Was there any indication of tenderness to your eye?

A. I could not see any. He also advised me that he had never taken a cargo, a full cargo of lumber on any ship that he had sailed.

Q. As a result of your survey what conclusion did you come to as to the amount of deck load that the "Saigon Maru" could have carried on this voyage?

Mr. Hayden: Now, if your Honor please, I think this testimony shows this witness did not make any tests at all, did not have any opportunity to. I don't see how he could give the result as to how much more the ship could take when he has not had a chance to make a test of what she would take.

Objection overruled. Exception allowed.

A. It was my opinion that the vessel could have taken at least 700,000 feet on deck; and if we had been allowed to have tested the vessel, and reloading should have commenced, we further stipulated that we would make further test as to her stability when a major portion of this amount had been put aboard.

Q. It was your opinion then, through the survey that you did make, that she could take at least 700,000 feet and possibly more?

A. That was my opinion, yes.

Q. Whether she could have taken more to be determined by a later test?

A. A later test.

Q. Counsel has just interposed the objection that you heard that you are not competent to give any opinion on this subject because the captain refused to let you make the test. I will ask you whether, without making these finer tests with the sling loads and ballast tanks, you were nevertheless able with the survey that you did make to reach a conclusion about what she could carry approximately.

A. Oh, from my past experience in the handling of steamers carrying lumber, both under deck and on deck, that she was well able to take more deck load than she had.

Q. Have you surveyed many ships of substantially the same size and type of the "Saigon Maru" itself?

9. Yes, sir. A great many.

Q. Does that experience enable you to form an opinion of what she should have taken on deck, without swinging these sling loads out and emptying the ballast tanks?

Mr. Hayden: Objected to as calling for a conclusion.

Objection overruled.

A. It is my opinion, as I stated before, in my experience, that I can tell approximately how much cargo a vessel can carry without going into these exhaustive tests.

Q. But these exhaustive tests enable you, after a major portion of the deck load is on, or at some

time during the loading, to reach a finer conclusion?

A. Yes, sir, reach a definite conclusion.

Court: After you put the load on the vessel, if you found her to be unstable, did you unload it?

A. Would I unload it again?

Court: Yes.

A. Yes, sir. That has been done a number of times. The surveyor is stationed at the vessel when she is completing, completes her loading, and I have never known of any cases when the surveyor has been there where it has been necessary to take off cargo. I have known a number of cases where vessels have been overloaded, where the surveyors have compelled them to discharge a part of the loaded cargo.

Court: What do you mean by the vessel being unstable?

A. Why, being too tender, subject to capsizing or rolling down and splitting her deck load.

Court: Can you ascertain that very well without the ship being detached from the wharf?

A. Yes, sir. During the loading, as the sling loads go aboard the ship, a surveyor can tell when the ship has got sufficient by the swing of the ship.

Q. In view of the court's question about stability, the term "tender" means that a ship has a tendency to careen over and capsize?

A. No, a ship could be tender—it doesn't necessarily mean that she is going to capsize.

Q. Well, I said a tendency.

A. A tendency to.

Q. Rolls easily?

A. Rolls easily, yes, sir.

Q. When it is stiff it is the opposite condition?

A. When it is stiff she rolls fast in a seaway.

Court: She what?

A. I say when a vessel is stiff, in what is called a seaway she rolls much quicker than she does when she is tender. When she is tender she rolls slow. When she is stiff she acts the same as if she was on a pivot.

Court: Is that a good condition of a boat?

A. It is not always a good condition.

Court: It is not a good condition or desirable that she go to sea too stiff?

A. No, sir, it is not a good condition that she goes too stiff.

Q. The terms "stiff" and "tender" are opposites, aren't they?

A. Yes, sir.

Q. What would you say, captain, as to whether a normal deck load, say 700,000 to 750,000 feet, would or would not have increased the seaworthiness of this vessel?

A. It always has been the contention that a normal deck load is safer for a vessel than only a partial deck load.

Q. Now, why is that?

A. Well, because when the vessel is in rough weather she takes the sea over her, rolls on deck, thereby endangering the ship, tearing the lumber

and breaking the lashings, where if she had a reasonably full deck load it is a very rare instance where the sea washes over the deck load. It washes up on the side and may slop over on deck, but it does not wash clear over the ship as it would in the case of an under-sized deck load.

Q. I want the court to get an idea of the security with which these deck loads may be lashed. Will you please explain that?

A. Why, the deck loads are secured by means of upright stanchions, well blocked, with a series of wire or chain lashings to the masts and across the deck load from heavy ring bolts. The masts and structure around the masts support the deck load, as well as the lashings, and with a deck load properly secured it is a very rare instance in a steamer where she has lost her deck load; very, very rare.

Court: Can you secure it so it does not shift in any way?

A. Yes, you can secure it so that the shift is very imperceptible. Take a natural deck load of eight or ten feet, there is a little more action on the top than there is on the bottom. Now that rolls with the ship—the whole ship gives. The ship is not constructed that there is not some give in the top of it. Of course, the higher up you go, the more give there is. This deck load may work an inch, it might work an inch and a half, but it is absolutely impossible to stow or secure any deckload that is absolutely compact without some perceptible movement in it. But it can be secured so that it will

not what the term is called "shift" sufficient so that it will break the lashings or be washed overboard. Because if the deck loads on these ships continually shifted they would be tearing the bulwarks out, causing the ship to leak and founder.

Q. What means are there to keep these lashings tight?

Mr. Hayden: Are you speaking of the "Saigon Maru" now, or are you speaking of some other ship?

Mr. Wood: I am speaking of the general method of lashing deck loads.

Mr. Hayden: I object, if your Honor please, on the grounds that have been stated heretofore.

Recess until 2 P. M.

Portland, Oregon, December 13, 1919. 2 P. M.

EMILE C. GENEREAUX—Resumes the stand.

DIRECT EXAMINATION—Continued.

Q. At the adjournment, Captain Genereaux, I was asking you about the method, I think, of keeping these lashings secure and fast on these deck loads; how they tighten them up and how they keep them tight.

A. Do you want me to go over the entire matter again relative to the fastening and securing, or just to the method of taking care of them after they have been secured?

Q. Yes, you have already stated that they are se-

cured on the outside with these heavy upright stanchions and lashings across back and forth to the masts, and so on. Now, how do they keep them tight?

A. The cross lashings, as a general rule, are connected by turnbuckles. They are lashings, wire lashings that are fitted so that they may be set up by the use of the ship's winch. As the ship proceeds on her voyage, the lumber settles, gets a little closer together, which necessitates the re-tightening of the lashings from time to time. This is being continually watched by the ship's officers so as to keep the deck load entirely secure during the voyage.

Q. I would like to show you these photographs of the "Saigon Maru's" deck load that have already been introduced in evidence, and referring to Claimant's Exhibit 6, Yamamoto, I will ask you to please point out the turnbuckles there.

A. Here are the turnbuckles here, here and here. And then these wires that run across here are secured here, can be tightened up from time to time. Also the deck load, the lashings are taken over to these masts and are arranged that they can be reset up from time to time as necessity warrants. Other lashings that come down to ring bolts on the deck here, you see, that can be tightened up. These lashings are put in a series of shackles along the deck, and the lashings brought down to the winch, and the steam is turned on there every day, maybe two inches, three or four inches, as the case may be, taken up, as the deck load kind of finally works to-

gether. As you see, in stowage of deck load, there is always a little space left here and there that she does not fit exactly tight. When there are openings in the deck load that do not fit tight, they put in wedges, as you will see there. They wedge them so as to make them solid.

Court: Are these wound by winches?

A. Yes, bars put in, and they are twisted up. There is a claw on here, hook, ring-bolt or eye-bolt. That is either shackled together here or lashed. Then as the turnbuckle is drawn tight so there is no opportunity to retighten it, then it is slackened up again, links shortened up, chain shortened up, and then they are re-tightened.

Q. Here is a picture of the after deck load, Claimant's Exhibit No. 4.

Court: What ship is this?

Mr. Wood: This is the "Saigon Maru," the ship in question. These are taken in Nagasaki by the claimant.

A. This just simply shows the top of the hatch.

Q. The deck load aft was not put over the hatch at all?

A. No, that was only about four feet high. You will notice the method here in which the lashings go over the deck, attached to the bulwarks, down to ring-bolts in the mid-ship section; other lashings, as you will see here, forward attached to turnbuckles. Now, when the deck load is seven or eight or nine or ten feet high, these lashings at the ends here are carried to bitts on the poop and also to bitts on the

forecastle head; corner lashings so there is no possible chance for the deck load to shift out-board. And then other lashings are brought up to the mast and set up tight, double lashing to each mast. So if the deck load is properly stowed and properly secured, it is almost an impossibility for it to move from its position.

Court: You say this was taken at Nagasaki?

Mr. Wood: Nagasaki, yes; both at Nagasaki. This is the forward deck and this is the after deck. The steering rods that have been so much discussed run along here.

Court: I see. How far are those steering rods above the deck load?

A. I should say about three foot six to four feet.

Court: And this load is how high?

A. This load here is four feet high.

Mr. Wood: That is just to the bulwark?

A. Just to the height of the bulwark so the bulwark holds it in.

Q. Ordinarily, Captain Genereaux, how high would the deck load be placed above the bulwark rail?

A. Ordinarily from four to twelve feet. We have had deck loads as high as eighteen feet.

Q. If this ship had taken a deck load of 700,000 to 750,000 feet, how high would the deck load have been forward and aft?

A. Why, the deck load forward would have been about 10 feet and the after deck load about 8 feet.

Q. Not above the bulwark rail, but above the deck?

A. No, no; this is above the main deck.

Q. The total height of the deck load?

A. The total height of the deck load.

Court: How far would that reach above this steering rod?

A. That would reach about, on the after deck, about either to the top or six inches over.

Court: And what proximity would it sustain to the steering rod.

Q. How close.

A. At that height it would be practically at least two feet from the steering rod.

Court: On either side?

A. Yes.

Q. Explain that, captain.

A. As the deck load is loaded on the ship, when you get to the top of the bulwarks, the deck load is drawn in as you go up, the deck load is not built in a square block; it is narrowed in as it gets to the top, so that you will have a good opportunity for drawing your lashings over the deck, and the top of the deck load is built—the deck load is crowned.

Q. It is like a whale-back, isn't it?

A. It is like a whale-back. So when you bring your lashings over, your lashing is taking every point of the lumber, not leaving any unprotected. And after your stanchions are in, as a general rule they are blocked, and the stanchions are fastened

with a lashing across from one side of the ship to the other.

Q. Will you indicate to the Judge the stanchions here.

A. It shows here. Here are two of those stanchions. Now, these stanchions are generally eight by twelve or six by twelve, and they are generally put in there——

Q. You mean eight by twelve inches?

A. Inches.

Q. That is heavy timber?

A. Yes. They are generally put in about ten feet apart, and they are thoroughly wedged on the base so there is no chance for them to work or move out, and as the deck load is completed and lashed, and the stanchions lashed, then the stanchions are rewedged to the deck load.

Q. The stanchions are slanted inward, are they not, captain?

A. They toe inboard.

Q. To make the deck load assume this whale-back shape that you have described?

A. Yes, sir.

Q. And that also in the case of a ship like this operates to draw the deck load away from the steering rods, does it not?

A. Absolutely. About a month previous to this there was loaded here the steamer "Luckenback" with 11-ft. deck load with similar arrangement of steering rod as the "Saigon Maru."

Mr. Huffer: Object to testimony concerning the "Luckenback."

Mr. Hayden: If your Honor please, in order not to interrupt I understand the court has adopted the policy to overrule all these objections and allow us an exception.

Court: Yes.

Mr. Hayden: May we just have that run through the record that way so that we won't have to be wasting time?

Court: You may have them, if you desire. I don't know that exceptions are necessary in a suit of this kind. It is akin to an equity proceeding. The evidence is reviewed if it goes to the Court of Appeals, and that that is immaterial will be disregarded in the Court of Appeals, and that that is material will have its weight.

Q. Captain Genereaux, of course you understand the Court of Appeals only has a bare record to read, and therefore I have to go into things that really are apparent to us all in the court room, where we have the photographs to use, etc. For that purpose I will ask you a few questions about these stanchions. These stanchions are heavy upright timbers, you would say, eight by twelve?

A. From six by twelve inches to eight by twelve inches.

Q. And about how long are they?

A. That is gauged by the height of the deck load. Generally from two to four feet higher than the deck load. It acts on the completion of loading,

as a general rule, there is either a life line attached to each stanchion from one end of the ship to the other, or a series of two by six or two by eight planks spiked to these stanchions as life line guys.

Q. Now, these stanchions are placed upright against the bulwarks, are they not, and just inside the bulwarks?

A. Inside the bulwarks.

Q. To use the simile, they are like the stanchions that you see all the time on freight cars carrying loads of lumber.

A. Yes.

Court: Does the lumber rest on sills that are placed under the load, or come in contact with the deck?

A. The lumber itself in 99 cases out of 100 is started right on the deck.

Court: Without any sills?

A. Without any sills. In a very few instances there have been sills put down in the nature of a one-inch batten, would be laid athwartships.

Court: The deck is oval shaped, isn't it?

A. Well, the crown is hardly perceptible in the ship's deck. She may have two or three or four up to ten inches of a crown. But in the width of 45 to 50 odd feet, it is hardly perceptible to the naked eye.

Q. You have spoken of these stanchions being slanted in, and have also mentioned the wedges. Those wedges, as I understand it, are driven in

between the stanchions and the bulwarks, are they, or what?

A. No. The stanchion originally is placed in position with the proper inboard lean. They are blocked firmly to the bulwarks. When the lumber is placed on deck, the lumber is stowed securely up to the stanchion.

Q. I see. When you spoke of blocked to the bulwarks, what did you mean by that?

A. Why, the bulwarks of a ship carry a rail which is sometimes four to six inches inboard, and also bulwarks are tilted inboard at a slight angle. Sometimes this causes too much of an angle to the stanchion; therefore it is necessary to put a block between the heel of the stanchion and the bulwarks.

Q. And the bottom of the bulwarks?

A. The bottom of the bulwarks.

Q. On the deck?

A. On the deck.

Q. Then the lashings are carried from the stanchions to the mast and back and crisscrossed?

A. The main lashings are secured to the stays and through the hawse pipes of the bulwarks; also to ring bolts in the vicinity of the base of the bulwarks.

Q. Now, the upshot of this detailed method of lashing that you have described, is, as I understand you to have already said, that the deck load is so securely lashed that it in effect becomes a part of the vessel, does it not?

A. Practically becomes a fixture to the vessel, properly secured.

Q. And when you spoke of the necessity of tightening up the lashings every day or so, does that occur throughout the voyage or is that only in the early days?

A. No, just in the early stages of the voyage.

Q. The stanchions in those photographs have been cut off, have they not. They are not the normal length, are they?

A. No. They are suitable length for this sized deck load. The object of the stanchion protruding above the deck load is simply to form a hand rail or life guard rail for the protection of men going forward and aft about the ship.

Q. You stated that in your experience you had surveyed probably 800 to 1000 steamers or sailing vessels carrying deck loads. Have you ever lost a deck load of lumber?

A. In my experience as surveyor, I have never had a report from the underwriters as to the loss of any deck loads of which I had had any supervision as surveyor.

Q. Well, if such a loss had occurred, would you have received a report from them in the ordinary course?

A. Yes, sir.

Q. I suppose these thousand ships that you have surveyed were going to all parts of the world, were they not? The Orient as well as other places?

A. Yes, sir.

Q. Some to India, I presume?

A. All parts of the world.

Q. Is it part of a surveyor's duty to estimate the amount of coal required by the ship for the voyage?

A. It is one of his duties.

Q. Knowing the type of ship that the "Saigon" was, and assuming that her coal consumption was 30 tons a day at sea, or 32 possibly (I will say parenthetically, your Honor, that the master of the ship has testified both ways; one place he says that his coal consumption at sea was 30 tons, and another place he says 32), assuming that was her coal consumption, her speed about eight knots, what would have been a proper allowance of coal in your opinion to take her to Nagasaki from this port?

Mr. Hayden: Object to the question in that it is not supported by any facts in testimony. The testimony shows that the captain said that he burned somewhere in the neighborhood of 32 tons a day at sea, but there is no testimony that she made eight knots. You can figure out the distance across the ocean where she went, and it is impossible from the time it took her to have gone eight knots. The captain has not shown himself qualified either.

Mr. Wood: In what respect has he not shown himself qualified?

Mr. Hayden: He has not shown himself qualified to judge of the coal consumption of this ship in view of anticipated weather and necessary re

serves and characteristics, retardation of the movement of the ship in case of storms. Those are matters which come from experience of a man with his own particular ship, and the captain has not shown that he has any qualifications with regard to any ship even, of the same size or character as this ship, in that matter. He has not shown he ever bought coal for ships, that he ever saw how much was left at the other side of the line. In other words, he is not qualified.

Q. Well, I will ask you, captain, a little more in detail. In every survey that you make of a steamer to determine what cargo she shall take, do you not necessarily have to take into consideration the amount of coal she should carry on her contemplated voyage?

A. I do.

Q. Isn't it a regular thing for surveyors in making a survey to estimate the amount of coal required by that ship for that voyage?

A. It is, yes, sir. We always estimate a minimum amount.

Q. And then add something for margin of safety, do you not?

A. Our rule is that we take the ship's log and we get a voyage, ocean passage, based on so many miles per hours, so much consumption of coal per day, and the reserve in the neighborhood of around 30 per cent extra coal over the estimated amount the ship would consume in that passage.

Court: Is that the usual rule?

A. That is the usual custom in the Columbia River. The usual rule out of Puget Sound has been about 25 per cent more coal than her usual passage, to take care of delays and storms.

Court: Well, did you do that in the case of the "Saigon Maru"? Did you get her log and ascertain the average consumption?

A. Yes, sir. No, we didn't get a chance to look at the log, but from information that we got from the master and the engineer on the amount of coal that the vessel consumed, and also what her average speed was on an ocean voyage.

Mr. Wood: I will say, your Honor, that the coal consumption has been testified to as I have stated. It is also in the evidence that the ship made the passage from here to Nagasaki in 26 days, and I think it is in the evidence—of this I am not sure—that her speed is around eight knots.

Q. Assuming that her coal consumption was 30 to 32 tons, captain, and her speed about eight knots, and with the knowledge that you gained about this particular ship from the captain and engineer when making the survey, what would you say would be a proper allowance of coal to take the vessel to Nagasaki?

A. From 975 to 1000 tons.

Q. Does that allow the 30 per cent margin for safety that you mentioned?

A. Yes.

Q. The captain of this vessel has testified that as he consumed coal at sea his stability was lessened

because he necessarily had to consume about two hundred tons of the hold bunker coal first, due to his fear of spontaneous combustion.

Q. I will ask you to give your idea about the danger of spontaneous combustion, and also as to whether the use of the lower coals would lessen stability in view of the fact that the bunkers on the ship were arranged so that the coals could be passed from the upper bunkers to the lower.

A. Why, relative to spontaneous combustion, with coal it is a rarity with our western coals, especially where the coal is fresh, and it is being consumed with the bunker doors open, free circulation of air, the liability of spontaneous combustion is mighty small. Now, as the coal is consumed in the lower bunker, the upper bunkers, which are tributary to the main cross bunker, allow the coal from the top bunkers to take the place of the coal consumed from the lower bunkers and when a certain portion of this coal has run off from the upper bunkers, it is then shoveled into the lower bunkers, the remaining coal. So at practically all the time the lower bunkers can be kept full. By this method the stability of the ship is not decreased, but increased.

Q. In the usual handling of a steamer are the coals from the upper bunkers transferred to the lower bunkers as the lower bunkers are consumed?

A. The coal from the upper bunkers is transferred to the lower bunkers as the coal from the lower bunkers is consumed.

Q. That is what good seamanship requires, is it not?

A. Yes, sir.

Q. I will show you a pencil diagram attached to Captain Yamamoto's deposition, marked "Claimant's Exhibit No. 10, Yamamoto". It is rather clumsy, but I will ask you by the use of this diagram to illustrate to the court the position of the coals and how they are transferred from the upper bunkers to the lower bunkers.

Mr. Wood: This, I will say for everybody's information, as I have studied this, is the cross bunker in the hold. It is so marked. This next one is 'tween deck bunkers, and they run parallel with the length of the ship, that is in the wing of the ship, and also as I understand it a piece across. They are in the shape of a large U. And on top of all is the deck bunker as marked here.

A. As the coal is consumed from the lower bunker, the coals from the upper bunkers drop down into the lower bunkers through a hatchway or manhole; and as this quantity of coal is taken out of here so that it won't run any more, then the engine crew shovel the coal or wheel it over here and dump it down into the cross bunkers. The same takes place with the coal in the upper deck. It is transferred from one to the other. Some ships have chutes; others have to do it entirely by hand, or shoveling or wheeling.

Q. In short, then, there is no necessity for carrying your coals up high rather than low?

A. No, sir.

Q. The captain of this vessel has testified that as his voyage continued the stability of his vessel would have lessened from another cause, namely, the consumption of fresh water out of his No. 3 ballast tank. I will ask you to comment on that, Captain. I will ask you first what is the usual practice of a vessel when putting to sea as to filling all her ballast tanks at the inception of the voyage.

A. Well, the general custom is not to fill them all. The general custom in loading of lumber is to have one or two tanks empty leaving port.

Q. The reason being?

A. The reason being, in case the vessel should become tender or run into very bad weather the remaining tank may be filled. This is not a real practice. The advisability of keeping the tanks empty is to give the ship a full and complete cargo. We find in all steamers that it is not necessary to fill all the tanks to give her a full cargo of lumber. In most cases if you filled all her tanks you probably would not get a full and complete cargo of lumber on her. Relative to your fresh water tank, all ships have what they call an engine-room tank, which is generally called the No. 3 tank. This is filled with fresh water for boiler purposes.

Q. No. 3 tank?

A. The No. 3 tank. Sometimes they may use fresh water from the after peak tank, but the stability of a vessel is controlled on her loading, before she proceeds to sea, with the relative idea that the

fresh water tank will be consumed either in whole or partially on her voyage.

Q. Now, if the fresh water tank No. 3 in this vessel is consumed, is it possible to fill it with salt water?

A. Yes, there are provisions for that, if the apparatus is in working order.

Q. The captain of this vessel has testified that that was not possible for the reason that he could not empty the tank entirely, he could only partially empty it, and consequently, if he put salt water in there, he could not pump it out again with his suction pumps when he wanted to use the tank subsequently for fresh water.

A. Well, if it became a necessity to fill it with salt water, that could be done, and when she reached a port, the major portion of this salt water is pumped out with her main ballast pumps, which will probably leave two or three or four inches of water remaining in this tank. The balance of this water can be pumped out, or the major portion of it, with an auxiliary pump; and in a great many cases, if they want it absolutely clean, why, the crew is put in there to finish the rest of it by hand, or it may be washed out once or twice with fresh water.

Q. Can the crew get into those tanks even where there is cargo in the hold?

A. They can in the majority of them. They can in all the engine-room tanks and the tanks from the shaft-alley.

Q. Would the engine-room tanks include this No. 3 tank in this vessel?

A. Yes, that is the tank I have reference to.

Court: How many tanks are there on this ship?

Mr. Wood: There is the diagram there, your Honor. I believe it is five.

A. Five main tanks.

Q. Do you know whether this vessel was equipped with a condenser and evaporator?

A. I do not. As a general rule steamers are equipped with evaporators.

Q. And condensers?

A. Yes.

Q. Captain Genereaux, will you please state whether or not you have loaded vessels with deck loads where you actually had to build the deck load around the steering rods leaving a tunnel through the deck load for the steering rods to pass through?

A. There are some types of steamers that carry their steering rods from the top of their house amidships to the top of the poop deck, running fore and aft, one on each side of 'midships. These are supported by stanchions, iron stanchions. When a cargo of lumber is loaded, these supports and rods are removed until at such a time that you come within a foot of the original line of these rods. Then we build—

Q. Now, these rods are not out on the bulwarks, are they?

A. No.

Q. They are right along the main deck, are they not?

A. I have specified here that they led from the top of the amidship house amidships, one on each side of the mast, or center obstruction, whatever it might be, to the poop aft, then connected to the chains to the quadrant. When you commence loading lumber these rods and stanchions are removed until your deck load is built within a foot of the original position of your rods. Then a two-foot tunnel, or two-foot frame of lumber is built and placed at intervals of four or five or six feet, leading from the 'midship house to the after house. Then these rods are connected up and carried on a blocking with a roller so that they are practically in their original position, and the lumber then is built all around this. They are firmly boxed in.

Q. When the deck load is finished, these steering rods are working through tunnels or shafts through the deck load?

A. Yes, sir.

Q. Shaft tunnels, I mean.

A. Yes.

Q. Captain Yamamoto, of this vessel, has testified that in the event of anything happening to his steering rods it would have been extremely difficult for him to substitute his hand steering-gear for the steam steering-gear at sea in violent weather. He spoke of the difficulty of sending sailors aft, the danger to their lives in sending them aft. He also spoke of the difficulty due to the swaying back and

forth of the rudder in the sea with the motion of the waves, which would make it difficult to connect up the hand steering gear. I would like you to inform the court of your ideas on the matter.

A. As previously mentioned, the vessel is so arranged by the hand life-lines along the deck that the crew are able to get from one end of the ship to the other during bad weather. That is the specific purpose for which they were put there. Or if there is any danger of anything happening to the steering apparatus, all ships are provided with relieving tackles which can be substituted. Vessels have been steered with the use of the relieving tackles.

Q. Can the relieving tackles be used quickly in bad weather in event of emergency?

A. Yes, sir. Yes, they can be equipped quicker than any other apparatus. If one section of the rod should break, or chain should break, it would not be necessary to allow the rudder to swing back and forth. The rudder could be jammed over to one side until such time as they could get aft there and put the relieving tackles on and have it under control.

Q. How would it be jammed over to one side?

A. Beg pardon?

Q. Wouldn't it require the relieving tackles to jam it over to one side?

A. No, I stated if one side of the equipment, of the steering rod equipment was damaged, the rudder could be put over to the opposite side, held in

position until your relieving tackles can be put on and your hand steering gear connected.

Court: What effect would that have upon the movement of the ship?

A. Well, if she was in a heavy seaway, she would fall in the trough of the sea. She would roll probably heavily.

Court: Well, would the rudder have any effect when it is jammed over to one side?

A. If she had any headway it would make her steer in circles.

Court: That is what I was thinking.

A. If it was an open sea, ordinary swell, she could navigate certainly until such time as they get the relieving tackle on, which should not take more than fifteen minutes to a half hour at the most to connect up. And if she was in a heavy sea she would fall in the trough of the sea. The action of her propeller would either have to be stopped or slowed up considerably until such time as they could connect up.

Q. What if she did fall in the trough of the sea—would that be so bad?

A. Not necessarily, if she was a seaworthy ship. It is quite common.

Q. I show you Claimant's Exhibit 8, Yamamoto, which Captain Yamamoto introduced to illustrate his hand steering gear on his ship, and the pencil mark here he added to it to show the quadrant. I wish you would explain that to the Judge, and also

(Testimony of Emile C. Genereaux.)

explain what you mean by the relieving tackles, how they are fastened on.

A. This, your Honor (referring to exhibit), represents the rudder post to the rudder, coming up through the main, the upper deck. Attached to this is a quadrant upon which the chains are attached from one side, and then this side to the rods running along each side of the deck.

Q. Pardon me, I think there is a picture of that right there. Here is the quadrant. One chain is fastened there, comes around this way to the rod, the other chain is fastened there, comes around this way to the rod (showing picture).

A. Then if necessity demands, the relieving tackles can be attached to the quadrant, for which provision is made in ships for hooking these tackles, either one side or the other, to the quadrants. There have been cases, where steering apparatus is carried away, where ships have been steered into port with relieving tackles, which are led to the winch, and the winch is operated, where the hand gear has been disabled. In a case where the steering gear is only disabled, it is simply a question of attaching the relieving tackles until you have your rudder in position to connect up your hand steering apparatus.

Q. Let me ask a few questions. The relieving tackle is block and tackle, either cable or chain or rope, fastened from the quadrant to eye-bolts, or

(Testimony of Emile C. Genereaux.)

something similar to that, off on the side of the ship?

A. Yes, sir.

Q. And that can be operated either by hand or by the steam winch, can it not?

A. Yes, sir.

Q. And the rudder can be controlled by the relieving tackles, either by hand or by the steam winch, with absolute security until the hand gear is made fast, can it not?

A. That is the purpose for which they are utilized.

Q. And where the steam steering gear and the hand steering gear are both disabled, the ship can still be steered by the relieving tackles, can it not?

A. Yes, sir.

Q. I think you have already covered this, but I want to make sure. Captain Yamamoto testified that the deck load if carried up higher would have come within two inches of his steering rods. You have said it would not come closer, I believe, than a foot or a foot and a half. Would there be any danger in securing this deck-load as it was intended to be secured, of this deck-load shifting over against those steering rods so as to disable them?

A. The method in which deck loads are secured is supposed to insure their absolute safety relative to shifting.

(Testimony of Emile C. Genereaux.)

Q. Well, supposed to—does it, is what I want to know. Does it?

A. From the testimony I have already given, I think I have shown that it does.

CROSS EXAMINATION.

Questions by Mr. Hayden.

Q. Captain, who is the San Francisco Board of Underwriters Marine Surveyor in Seattle?

A. Beg pardon?

Q. Who is the San Francisco Board of Marine Underwriters' surveyor at Seattle?

A. At the present time?

Q. Yes.

A. Captain S. B. Gibbs.

Q. You spoke about being surveyor for the San Francisco Board of Marine Underwriters. Is that at the same time that Captain Gibbs was surveyor?

A. Yes, sir.

Q. At that time you were an assistant to Captain Gibbs, then?

A. Yes, sir; signed myself as marine surveyor.

Q. When you ceased connection with the San Francisco Board of Marine Underwriters you were then an assistant to Captain Gibbs? Is that right?

A. Yes.

Q. Then after leaving Captain Gibbs you went to the Foundation Company, did you?

A. No, sir.

(Testimony of Emile C. Genereaux.)

Q. You went with one of the dredging companies, I believe?

A. I was a short while with the Tacoma Dredging Company at Astoria.

Q. Then you went where?

A. Then I returned to Portland.

Q. Engaged in general surveying business?

A. Stevedoring, general survey, and as surveyor to Bureau Veritas.

Q. When did you become surveyor to the Bureau Veritas?

A. I cannot give you the exact date. I think it was about three and a half years back.

Q. That was after the war started?

A. Yes, sir.

Q. Did you become connected with the Foundation Company before or after that?

A. After. I was not connected with the Foundation Company. I was the representative of the French Government at Portland, Oregon, supervising the construction of the ships for the French Government.

Q. According to their plans and specifications?

A. According to the Bureau Veritas plans and specifications.

Q. You never were Lloyds' agent, were you?

A. Never was appointed agent, no. I was appointed to act on a number of cases for Lloyds.

(Testimony of Emile C. Genereaux.)

Q. By the local representative of Lloyds or by Lloyds' office in London?

A. By Lloyds' office in London and also by the local representatives.

Q. Lloyds' office in London is, of course, a British institution?

A. Yes.

Q. And I take it that in connection with your work then with Lloyds' office in London you had become familiar with the laws governing the loading of deck cargoes on ships going to English ports?

A. I did not do any work for Lloyds' in conjunction with loading. It was on damage cases only.

Q. Are you familiar with the laws of England in connection with the loading of cargoes to British ports, deck cargoes?

A. I was familiar with the amount of cargoes that were to be loaded aboard of ships at that time going to certain English ports.

Mr. Wood: Just a moment, your Honor. Counsel is evidently trying to show some British statute governing the carrying of deck cargoes to ports in Great Britain, and it is obviously incompetent and immaterial; nothing to do with the issues in this case; and I object to it.

Mr. Hayden: If your Honor please, of course we recognize Great Britain has been until very recently and probably is at the present time the greatest sea-faring nation in the world—has the greatest merchant marine. Its legislation has been made with

(Testimony of Emile C. Genereaux.)

respect to the safety of ships carrying deck cargoes. It is a fact I intend to prove—unless Mr. Wood admits it—that the laws of Great Britain specifically, on the amount of deck cargoes that shall be taken into a British port in the winter time, prohibit vessels from carrying over three feet of deck cargoes into British ports in the winter time. As this is Lloyds' man, who knows those laws—must know those laws—I may prove them by him, I think, as well as some one else.

Court: This ship would have arrived at its destination before winter.

Mr. Hayden: This ship, if your Honor please, would be going through the China Sea to Bombay during the period of the year when that sea was apt to be traversed by the typhoons, those terrible storms that come through that part of the country, the very worst season of the year in the China Sea part of it; was going up across the Bay of Bengal during the southwest monsoons, and it was going up to Bombay when it had those monsoons, in the worst season of the year, right on its beam. The character of those storms we will show is as severe or more severe than the storms that are to be encountered in the winter time going across the Atlantic; and this ship was on a voyage where she had to anticipate encountering that class of weather; and it was right during the time she was going across that that class of weather was reasonably to be expected to affect her.

(Testimony of Emile C. Genereaux.)

Court: I will hear the testimony. I do not see the relevancy of it just now.

Mr. Wood: Save an exception.

Court: Very well.

Q. You know, don't you, Mr. Genereaux, that English ships going into English ports, it is not only the custom but the law to limit the height of deck load on open spaces to the height of the rail, the main rail bulwark, or one-fourth of the inside breadth of the ship, but in no case over seven feet.

A. To what ports does that apply? All British ports in the world or the United Kingdom?

A. The United Kingdom I am talking about.

A. United Kingdom ports.

Q. That is so, is it not?

A. That was the law. During the war that was cancelled. Ships left here at all times of the year with full and complete deck loads, especially those that carried spruce.

Mr. Wood: For the United Kingdom.

A. Yes, sir.

Q. You say that was set aside during the war?

A. Yes. I don't know that that measure has been repealed again or not.

Q. That was an emergency measure, of course? They were running ships during the war of course when they were apt to be blown up by torpedoes and mines too, weren't they?

A. They certainly were. That law applies to ports of the United Kingdom only in the winter

(Testimony of Emile C. Genereaux.)

time; not at any other British ports throughout the world.

Q. I understand that exactly.

Court: Is Bombay a British port?

Mr. Wood: Yes, your Honor.

Mr. Huffer: Bombay, India.

Q. Now, Captain, where did these 250 ships, sailers, or steamers, that you had surveyed in 25 months go to? How many went to Bombay?

A. I couldn't tell you.

Q. Did any?

A. I couldn't tell you.

Q. Have you a recollection of having surveyed any ship on a voyage from either Portland or Puget Sound that was destined for Bombay, India, leaving here in June, arriving in Bombay on the first of August?

A. I couldn't say that I can remember.

Q. Your testimony, then, has no relationship, so far as your recollection is concerned, to any such voyage of a ship laden with lumber?

A. A marine surveyor is governed in the loading—

Q. Just pardon me a moment. I want the question answered, Captain, yes or no. Then afterwards you may explain anything you have to say.

A. I cannot recall it, but I have every reason to believe that I have.

Q. Is Bombay a port to which ships usually load lumber in your experience?

(Testimony of Emile C. Genereaux.)

A. Occasionally cargoes go to Bombay.

Q. But they are only occasional cargoes, aren't they?

A. That I could not say positively.

Q. Well, as a surveyor who has surveyed a thousand ships, if you had them all going there you would remember pretty well about it. But now don't you remember any cargo going to Bombay out of this thousand ships you have surveyed?

A. Not any one in particular, no.

Q. Do you remember one in particular?

A. No, I don't.

Q. Now, where was the destination of the greater part of these one thousand ships, sailing ships and steamers, that you say you have surveyed?

A. Why, Africa, Australia, India, China, Japan—all ports—South America.

Q. I say, the greater part. You didn't send the greater part to that number of places, did you?

A. Why, all of them went to some or other of these ports.

Q. Well, I asked you the destination of the greater part of these one thousand ships.

A. Oh, I would say China, Japan, the Philippines, Australia, South America.

Q. How many went to China then out of those? What proportion of those one thousand ships went to China?

A. Oh, off-hand, I would say probably one-third of them.

(Testimony of Emile C. Genereaux.)

Q. And how many went to Australia?

A. I couldn't say. I couldn't say off-hand how many did.

Q. Would it be as much as one-third?

A. I wouldn't say.

Q. Isn't it a matter of fact that more cargoes went to Australia than went to China?

A. Not in all my years of surveying, no. There were certain periods when more lumber would go to Australia than would to other ports; but I wouldn't say as a whole that there was more lumber went to Australia than there was to China or Japan, or that route.

Q. To what ports in China were these ships that you surveyed destined?

A. Oh, numerous ports.

Q. Well, which were the principal ones?

A. Shanghai, Tientsin.

Q. These two—is that all?

A. No, there were other ports.

Q. Are those the principal ones?

A. I don't quite recollect.

Q. Were those steamers or sailing ships that went to Shanghai and Tientsin?

A. Why, if I recollect there were both steam and sail to Shanghai, and probably steamers to Tientsin; there may have been some sailing vessels.

Q. You say they were sailing vessels that went to Shanghai mostly, and steamers mostly went to Tientsin?

● (Testimony of Emile C. Genereaux.)

A. No, I didn't.

Q. I didn't quite understand the answer, then, Mr. Genereaux.

A. Would you please read the answer? (Answer read).

Q. I want to get now, Mr. Genereaux, do you think it was 33 per cent of these one thousand ships that you surveyed that went to Tientsin and Shanghai?

A. Oh, no. No, there are other ports in the Orient that ships go to—Japanese ports, Philippine ports, East India ports.

Q. What ports in Japan did you send these ships to?

A. I have no recollection.

Q. And the Philippines?

A. Same reply.

Q. So you cannot give us the proportion then of the ships that went to these various places?

A. No, I cannot, without consulting the records.

Q. Can you tell us, this proportion that you say was about one-third, during what months of the year they went there?

A. All seasons of the year.

Q. What ports in the Philippines did they go to?

A. Principally Manila.

Q. Can you tell about how many ships you sent to Manila?

A. I cannot.

(Testimony of Emile C. Genereaux.)

Q. Do you remember one that you sent to Manila?

A. No, I can't give you any particular name.

Q. How long ago was it since one of these ships went to Manila that you remember, if you cannot remember the name?

A. Oh, from five years back.

Q. From where?

A. From some port on Puget Sound.

Q. What kind of ship was it?

A. I couldn't tell you.

Q. Have you got any clear recollection at all of any one ship that you surveyed that went to Shanghai?

A. Why, most of the Robert Dollar Company ships went to Shanghai. I surveyed a good many of their ships—the Bessie Dollar, the Robert Dollar, the Hazel Dollar.

Q. That was the regular run of the Robert Dollar ships, was it, across there to Shanghai?

A. The Robert Dollar people had different ports in China that they sent their ships to.

Q. Well, now maybe you can recollect some more about it.

A. Just the name of the port I don't recall.

Q. These ships all carried deck loads, did they?

A. Those that carried lumber cargoes carried deck loads.

Q. Well, of course, when you speak about the

(Testimony of Emile C. Genereaux.)

Robert Dollar ships—the Bessie Dollar, Robert Dollar, Hazel Dollar—did they carry deck loads?

A. They did.

Q. Did you make any difference at all in the quantity of deck load that you put on a ship in the winter time from that which you put on in the summer time?

A. The difference was regulated by the draft of the ship, a difference of probably from four to six inches, they were loaded lighter than they were in the summer.

Q. They had less deck load on them in the winter time than they had in the summer time?

A. Yes, a little less.

Mr. Wood: Pardon me. Did you say that the difference between the summer and winter draft was about six inches?

A. From four to six inches.

Mr. Wood: Giving them more free-board in the winter time?

A. Yes, sir.

Q. In the winter time you loaded the hold just as full of lumber as you did in the summer time, didn't you?

A. Yes.

Q. So this four to six inches was then caused by reduction in the height of the deck load?

A. In some cases it was. It is only in rare cases loading of a lumber steamer that she goes to

(Testimony of Emile C. Genereaux.)

her marks, when she is loaded with a cargo of lumber.

Q. Well, I understand a steamer loaded with lumber seldom goes down to her marks. I understand that to be the case.

A. Seldom goes down to her marks.

Q. But whether she goes to her marks or not, you would decrease the size of the deck load in the winter time?

A. There is a small decrease in some cases. Some cases they will not.

Q. You say that is from four to six inches in the draft of the ship?

A. I am speaking of the Dollar line of ships.

Q. Yes, I know.

A. They, as a rule, loaded to their marks. There were few ships that came under my supervision that did load to their marks.

Q. But with the Dollar ships you loaded less by four to six inches in the winter time; that is, loaded less in draft from four to six inches in the winter time than you did in the summer time?

A. Yes.

Q. Do you know how many tons it took to immerse one of these ships an inch?

A. Oh, I would say in the neighborhood of 35 tons.

Q. Thirty-five. What was the difference in the height of the lumber then under those circumstances?

(Testimony of Emile C. Genereaux.)

A. Oh, about from eight inches to one foot less.

Q. Are those Hazel Dollar and the Robert Dollar, are they ships in the neighborhood of 350 feet long?

A. I should judge so. I think they carry in the neighborhood of from three to three and a half million.

Q. That would amount, then, if the immersion to each inch was thirty-five tons, six inches would amount to two hundred and ten tons less weight that would be carried on those ships on the deck load in the winter time than in the summer time? That is correct, isn't it?

A. That would be the maximum.

Q. The Dollar ships are ships that are built particularly for the lumber-carrying trade, are they not?

A. The later ships that the Dollar Company built were, I believe.

Q. Does that include the Robert Dollar and the Hazel Dollar and the Bessie Dollar?

A. No, I think that only includes the Robert Dollar.

Q. The Robert Dollar. Mr. Genereaux, what are the forces which determine the stability of a ship?

A. What are the forces that determine the stability of a ship?

Q. Yes.

A. Why, the construction of a ship, the proper and efficient loading, proper amount of cargo.

(Testimony of Emile C. Genereaux.)

Q. Well, are there any other forces that you take into consideration when you are trying to find out whether a ship can take a certain amount of cargo or not?

A. By her displacement.

Q. Displacement is the only thing that you consider as to whether a ship can take cargoes?

A. As to the amount of cargo she can take.

Q. You say that two ships of the same displacement must necessarily be able to take the same amount of cargo safely?

A. Oh, no. That depends on the model of a ship.

Q. Yes. Well, isn't it a fact that there are two forces that apply to determine principally the stability of a ship? One of the forces is gravity, which pulls down, and the other is buoyancy, which pushes up?

A. That is correct.

Q. And isn't it a fact that the relationship of these two forces to each other either makes the ship top-heavy or makes her stable, or makes her too stable, as it were?

A. That is correct.

Q. What term do you use when you speak with respect to the force of gravity in a ship?

A. Metacenter.

Q. Now, can you tell us what the metacenter is?

A. Something that I never took up. I was not required to in the loading of cargoes on this coast.

(Testimony of Emile C. Genereaux.)

Q. Are you able to tell how you find the meta-center?

A. No, sir.

Q. Are you able to tell how you find in a ship the center of buoyancy?

A. Not from figures.

Q. You know, however, that as the center of gravity approaches the metacenter the ship becomes less stable? You know that, do you not?

A. I presume so.

Q. Now, in the use of coal and other commodities, things on board of a ship, as the voyage progresses, if their use shifts the center of gravity down of the ship she becomes more stable? Is that not so?

A. Yes.

Q. And if their use lifts the center of gravity she becomes less stable?

A. Correct.

Q. Assuming we had a column of coal, for instance, twenty feet high, of the same density and the same size, same dimensions all the way up, the center of gravity of that coal would be about ten feet or half way up and down, in the middle of it somewhere. Now, if you reduced that coal by taking out from the bottom, the center of gravity of what remained would be lowered all the time, would it not? In other words, if you take it 20 feet high, the center of gravity, we will say, was in the center, ten feet, you take down five feet off the bottom, the center of gravity would go down

(Testimony of Emile C. Genereaux.)

to about seven feet, would it not, seven feet and a half?

A. Approximately.

Q. And if you reduced that column down to ten feet, the center of gravity would be about five feet above the bottom?

A. Yes.

Q. Now, then, as you would use water in the bottom of a ship, the same principle would apply to water, would it not?

A. It would.

Q. If coal is lighter than water, and it is, as a matter of fact, is it not?

A. Yes.

Q. If you would use the same weight of water from the bottom of the ship that you are burning coal and lowering this column that we have been talking about, the center of gravity would stay in the same position, would it not?

A. If you used equivalent amounts.

Q. Yes. Now, on this ship, Mr. Genereaux, the captain has testified that he used 12 tons of water a day out of the bottom of the ship, and he has testified that he used in the neighborhood of 32 tons of coal a day. Can you tell the court what would be the relative change in the center of gravity of that ship by reason of the use of those two commodities?

A. That all depends on what the center of gravity of the ship was when she started out on her voyage.

(Testimony of Emile C. Genereaux.)

Q. Well, the water is much more dense than the coal, isn't it?

A. Yes.

Q. Do you know the specific gravity of coal?

A. No, I don't. The gravity of water, I think, is .63.

Mr. Wood: The question of density comes in—you are talking about tons. You are comparing twelve tons of water to thirty tons of coal.

Mr. Hayden: I just asked this gentleman if he knew the specific gravity of coal, and we could then compare the bulk of water with the bulk of coal.

A. A ton of coal will vary—probably forty to forty-five cubic feet to the ton.

Q. And water is about thirty-five, isn't it, salt water, cubic feet to the ton?

A. Something in that neighborhood. Sixty-three pounds to the—no, I can't call off-hand.

Q. Now, I didn't quite understand, Mr. Genereaux, what you had in mind when you spoke about putting additional lumber on this ship where you were going to put it. You say you would take 700,000 or 750,000 more, as I understand it. Where were you going to put it?

A. I didn't say she would take 750,000 more.

Q. Well, you meant she would take the difference between 241,000 and 750,000? Is that it?

A. 700,000 was my original estimate, approximating the amount.

(Testimony of Emile C. Genereaux.)

Q. Then that would be something about 500,000, somewhere in that neighborhood?

A. Somewhere in the neighborhood of 450,000.

Q. Where were you going to put the 450,000?

A. On top of the other lumber.

Q. What?

A. On top of the present deck load.

Q. How were you going to distribute it?

A. How would I distribute it?

Q. Yes.

A. That depended on the draft of the ship, or on the trim of the ship, how the ship should have been trimmed as to fore and aft draft at the completion of loading. If operations had continued there would probably have been an equal amount on each end, might have varied a trifle one way or the other.

Q. How much would putting this 450-odd thousand on have raised, then, the forward deck load?

A. Oh, in the neighborhood of I should say four feet.

Q. How much did you say she had in the forward deck load when you surveyed her?

A. Six feet.

Q. And what would you put on the after deck load?

A. Probably the same amount.

Q. You made a survey of the ship. Have you figures with you to determine, so that we may find

(Testimony of Emile C. Genereaux.)

out what is the length and the average breadth of the forward deck load of this ship?

A. Well, my recollection at the time that I made the survey that the deck load would take in the neighborhood of about one hundred thousand per foot, the entire deck load.

Q. That forward?

A. No.

Mr. Wood: The entire deck load.

Q. Oh, the entire deck load. Well, I want to find out what it would be, if you have any figures, as to how much it would take per foot on the forward deck load.

A. Oh, I couldn't give it to you exactly without measuring the deck again, but I should say somewhere around between forty-five and fifty-five thousand feet for a foot in height. This is over the hatches.

Q. Now, you are making allowances there for winches?

A. Yes, sir.

Q. Leaving winches open?

A. Winches open, closing the winches in as you get higher up.

Q. How are you going to use the winches for this relieving tackle and to tighten up the lashings on this cargo if you close them all up?

A. They don't close them up.

Q. That is what I was asking you, if you left them open.

(Testimony of Emile C. Genereaux.)

A. Why, yes.

Q. I understood you to say you closed them up.

A. I said partially. They were partially inclosed as you went up.

Q. You didn't mean to say you covered them over, then?

A. Absolutely not.

Q. Then how much do you figure you would take on the after deck load per foot of height?

A. Something similar to the forward.

Q. Well, you haven't any figures at all, have you, that you determine that?

A. No absolute figures, no, sir.

Q. Captain, the captain of this ship testified that when he reached Nagasaki he had 250 tons of coal left in his bunkers, and when he left Portland he had 1200 tons of coal in his bunkers. What have you got to say about that as being a reasonable amount of coal to take as a margin of safety?

A. From evidence shown, the ship was 26 days on her passage and consumed between thirty and thirty-two tons, there is a discrepancy somewhere.

Q. That is all right. I don't doubt there is a discrepancy. I admit there is a discrepancy. But I am asking you, he testified when he got over to Nagasaki he had 250 tons of coal in his bunkers.

A. In any particular bunkers, or 250 tons?

Q. All the coal left in the ship was 250 tons. Now, what have you got to say as to whether or

(Testimony of Emile C. Genereaux.)

not that is a fair reserve for that kind of a voyage? Maybe you would like a piece of paper and pencil to work it out with.

A. I would say that was somewhat of an excess.

Q. You said, did you not, that you allowed 30 per cent?

A. About 30 per cent, yes, sir.

Q. Well, then, we have 1200 tons, we will take 250 from it, then he consumed 950 tons.

A. According to his testimony.

Q. And thirty per cent of 950 tons is 285 tons?

A. Yes.

Q. And he had 250 tons left. Then you would not say he had taken an excessive amount, would you?

A. No, not with those figures.

Q. The reason that you as a practice leave a margin of coal for safety is to eliminate the chance of being without coal in case the vessel would be delayed by stormy weather? Is that not so?

A. That is so.

Q. You have surveyed a great many ships. Have you surveyed many Japanese ships?

A. Yes, quite a few.

Q. And don't you know, as a matter of fact, that it is the custom, the usual practice rather, to carry substantially from twelve to thirteen hundred tons of coal on a trip across the Pacific in such ships, about three hundred and fifty feet long?

(Testimony of Emile C. Genereaux.)

A. They range from 960 tons to 1250 or 60 tons.

Q. Now, a slow ship is very much more retarded by a heavy sea than a fast ship, is she not, proportionately?

A. Proportionately, yes.

Q. So that with a slow ship you have to figure on a greater margin of safety for your coal than you do with a rapid ship? That is right, isn't it?

A. Why, we have always based our coal on our ships—that is, the average tramp ship makes between eight and nine knots. The difference in the speed does not amount to a great deal. Therefore our coal is based on approximately that speed.

Mr. Hayden: Now, would you mind reading the question? (Question read.)

A. Yes; I can answer that.

Q. The proportion of cargo that can be taken on deck on a ship depends upon the weight of the cargo in her hold, does it not?

A. Not entirely weight of cargo, but the weight of everything on the decks.

Q. Yes, the entire weight of what she has in her decks, under decks. So that if it is true that a vessel does not carry as much lumber under deck because of the construction of the vessel, then you cannot expect her to carry so much lumber on deck and still be stable, as a ship that will carry more under deck, can you?

A. That depends a good deal on her water ballast.

(Testimony of Emile C. Genereaux.)

Q. Assuming the water ballast to be about the same, proportionately the same.

A. The question relative to the water ballast is always reserve, or should be reserve ballast, why one would offset the other, with the extra ballast that you would be able to put in this ship's bottom relative to the extra amount of deck load that you can put over a certain percentage of shortage in the hold.

Q. I don't understand the answer to the question at all, Captain. Maybe if I go over it again we will get at it. The weight under deck—water ballast, coal and everything else—determines, as a matter of fact, the safety of the quantity you can put on deck, does it not?

A. Certainly.

Q. So, assuming for the sake of the question, that there is the same weight under deck of coal and water ballast in one ship that there is in another, and one ship takes less cargo under deck, she would not be able to take as much cargo on deck as the ship that took more cargo under deck?

A. Probably not.

Q. Isn't it an absolute fact that she could not?

A. Well, it probably would be in some cases; in other cases not.

Q. Well, now you say probably I suppose because you have in mind the different shape of the ship's bottom. Is that the reason that you said probably?

(Testimony of Emile C. Genereaux.)

A. The reason I said probably depends on what discrepancy you have reference to in the amount of cargo that the one ship would have less than the other. Are you making any particular finding—any particular amount?

Q. I am not talking about any particular amount. I am talking as to the relationship merely to get at the idea that there is a relationship.

A. Well, of course, it is a proven fact that she would not be able to take quite as much as she would if she was completely full under deck.

Q. Now, there is another element that enters into it, and that is the peculiarity of the ship. One of these modern tramp ships, which is very sharp at entering and very bluff at leaving the water, that is, the bow of her is a bluff bow and the stern of her is not much cut away, she hasn't much run, broad beam, comparatively shallow draft, has considerably more ability to carry a deck load than a ship that is cut away a good deal forward and cut away a good deal aft on her bottom and is a deep ship, has she not?

A. She has, yes.

Q. So that, in order to determine whether or not one ship should carry as much deckload as the other, you have to know the entire hull construction of the ship, do you not?

A. Not necessarily, you have to be familiar with the entire hull construction.

Q. Explain why you do not have to be fa-

(Testimony of Emile C. Genereaux.)

miliar with the entire hull construction, Captain, explain that answer.

A. A man gets a general idea from the mould of his ship by going inside of her. When he makes his preliminary survey, he ascertains then if she is a fine line ship, deep or broad, which gives him a general idea.

Q. That is exactly what I said, Captain, you have to know the construction of the ship in order to determine whether one ship will carry as much as the other.

A. You have to know it to a certain extent.

Q. Well, you say you have to know it to a certain extent. The nearer you know the exact extent, the better you can tell, can't you?

A. Yes, you probably could. It is not always necessary for a man to have to go through a ship minutely to ascertain her general lines of construction.

Q. You know that it is the general practice to have curves of stability for each particular ship, do you not?

A. Yes.

Q. You know that as a general rule those curves of stability vary with every ship, do they not?

A. They do.

Q. And depending on those curves of stability as a basis, you figure the stability of each particular ship?

(Testimony of Emile C. Genereaux.)

A. Yes, sir.

Q. Is that right?

A. The ship when she is constructed has her curves, lines and molds. On those are estimated the amount of dead weight tonnage she will lift.

Q. You have to use those curves of stability, however, to determine the stability of each particular ship?

A. That is the method employed by the naval architect. It is not used in common practice for loading of a ship.

Q. And if you haven't got the curves of stability of two ships, you are not able to tell exactly whether one ship will be stable where the other will not be stable, can you?

A. I don't consider that it is essential, in the modern term of speaking, to be absolutely familiar from an architectural standpoint with the curves of a ship to pass an opinion relative to about what cargo the ship can lift.

Q. Do I understand you to mean then that a ship with very fine lines, in your opinion, can lift as large a cargo as a ship that is broad and flat?

A. I didn't infer that at all.

Q. It is your opinion, is it not, that a ship that is broad and flat, even if she has the same displacement, will carry more deck load than a ship that is narrow and fine?

A. That is correct in my opinion.

Q. Without the information to determine what

(Testimony of Emile C. Genereaux.)

class the particular ship that you are inquiring about belongs to, you cannot form a clear idea as to what she will carry on deck?

A. Why, you can from an examination of the vessel. A man cannot go blindly in the dark aboard of a ship and tell you what she will carry, without making an examination either from outboard or inboard. All ships, as a general rule, carry their blue prints aboard, showing their lines of construction, their mold, etc.

Q. Now, you say you have been to sea some thirteen years, was it, Captain?

A. About fourteen years.

Q. Nine years master?

A. Yes.

Q. What kind of ships were you master of?

A. Sailing vessels, sailing schooners and brigs, steam schooners.

Q. Did you ply on steam schooners up and down the coast?

A. Yes, sir.

Q. Did you ever have command of a steel steamship or iron steamship of four or five or six thousand tons?

A. Never did. I have a Government—

Q. Your steamship experience was, I take it, navigating up and down the coast on these short runs?

A. Yes, sir.

(Testimony of Emile C. Genereaux.)

Mr. Wood: What were you about to say, Captain, when you were interrupted?

A. I was going to say I hold an American Master's License, unlimited license, for ocean-going sail and steam, which qualifies me to handle these ships.

Q. Yes, but you never have had any experience with handling these ships?

A. No.

Q. How many voyages have you made during the months of July and August through the China sea?

A. None.

Q. Or the Indian Ocean?

A. None.

Q. You never have had any real experience then with the typhoons and the monsoons of those oceans?

A. None whatsoever.

Q. You said that you did not know of any ship with a deck load of lumber where any complaint had been made by the underwriters with respect to the shifting of the deck load. Do you know of any ship that had a deck load of lumber that went out and never came back, was never heard of?

A. I said that I had had no complaint, or had no report from the underwriters relative to any steamers that I had passed on.

Q. Oh, you have had reports of underwriters, though, from steamers that you have not passed on

(Testimony of Emile C. Genereaux.)

with the deck load shifting? Is that what you mean?

A. Yes.

Q. On what voyages were those, do you know?

A. On which? The vessels?

Q. Where the deck load shifted.

A. Oh, I have seen I think one or two steamers that returned to Puget Sound with shifted deck loads. I cannot recall the name of one in particular that loaded out of Puget Sound, but not under our jurisdiction. It was finally turned over to our office for reloading and certificate. I don't remember the particular name now.

Q. Those were vessels that loaded on Puget Sound?

A. Yes, sir.

Q. Under the jurisdiction of some surveyor, I suppose?

A. Jurisdiction of owner's surveyor.

Q. Now, how many more than those two you have referred to have you heard of the deck load shifting?

A. Oh, I understand there has been one or two a number of years back that have come back to the Columbia River.

Q. Came back to the Columbia River?

A. Shifted deck load, yes.

Q. What caused those deck loads to shift, did you understand? Was it storms?

(Testimony of Emile C. Genereaux.)

A. Storms and improper securing; improperly lashed.

Q. Now, I will ask you if you haven't heard of ships that have started out to sea with deck loads of lumber on them that never returned, showed up at all?

A. Well, I have heard of sailing vessels. I don't recall any steamers.

Q. You don't recall any steamers?

A. Not in particular, no. I have heard of steamers that have run ashore, total losses.

Q. I don't mean steamers that have gone ashore, total losses. I mean those that never showed up at all. Never heard anything of them, after they went out with a big deck load on.

A. I don't recall any in particular.

Q. Do you remember the Siko Maru? Do you know anything about her?

A. No, I don't recall it.

Q. You never heard anything about her at all?

A. I don't recall.

Q. Did you make an examination of the bulwark rail of the "Saigon Maru"?

A. I did at the time, yes.

Q. What is the tumble-home or inboard leaning of the bulwark rail from the top of it down to the deck?

Court: Is that another ship you are inquiring about?

(Testimony of Emile C. Genereaux.)

Mr. Hayden: No, the same ship, your Honor, the one in question here.

A. I don't recall exactly. It might have been half an inch. It might have been an inch.

Q. That is, the top of the bulwark rail at the outer edge of the plane would be something like half an inch nearer the center of the ship longitudinally at the top of it than it was at the bottom of it?

A. Yes, I should say something in that neighborhood.

Q. Now, the thickness of the bulwark rail is the same at the top as at the bottom, is it not?

A. Not in all cases, no.

Q. Was it in the "Saigon Maru" case?

A. I couldn't say.

Q. There is very little difference, however, a matter of an eighth of an inch?

A. About one-eighth to three-sixteenths less.

Q. Did you measure the top of the rail on the "Saigon Maru"?

A. No.

Q. You don't know the width of it then?

A. Not the exact width, no. It might be six inches; might be eight inches.

Q. Might be four inches? I think you said four to six inches at first?

A. Yes.

Q. Now, as I understand it, Captain, when you want to fix your stanchions to hold the lum-

(Testimony of Emile C. Genereaux.)

ber, you first put the side of the stanchion up against the inside of the rail, then the heel or the bottom of the stanchion you either put up against the bottom of the plating of the bulwark, or you put a block in between it and the plating of the bulwark?

A. Yes.

Q. Do you know in this instance whether or not there were any blocks between the bottom of the stanchions and the bulwarks on the after deck?

A. No, I don't recall whether there were or not. The stanchions had so little function on that ship that I didn't pay any particular attention to them.

Q. Isn't it quite customary to butt the bottom of this wooden stanchion up against the outside of the bitts as a brace, instead of up against the bulwark rail, and block from the bulwark rail out to the bitts?

A. Put the stanchion on the inside of the bitts?

Q. Yes, and block from the rail out to the bitts.

A. I never saw that done.

Q. Never saw that done?

A. No.

Q. Which is the way you have always seen it done, Captain?

A. Why, as you have described it a little while ago, placing the stanchion up against the rail, and when found necessary, to put a block at the heel of the stanchion, securing it until such time—

Q. Did I ask you if you knew whether there were

(Testimony of Emile C. Genereaux.)

any blocks put against the heel of these stanchions?

A. You asked me and I told you I didn't remember.

Q. You didn't know?

A. No.

Q. Did you measure the height of the bulwarks on the after deck?

A. I did not. I measured the height of the deck load.

Q. Did you measure the height of those stanchions which supported the rod, steering gear rod that ran across the top of it?

A. No. No, I didn't, but I should say they were approximately three foot six above the bulwark.

Q. So when you speak about that height, you are giving us your best recollection of an estimate?

A. Yes, sir.

Court: I think the court will have to adjourn at this time. How long are you going to occupy with this witness?

Mr. Hayden: I don't think I will be over an hour longer, your Honor.

Mr. Wood: I don't like to ask anything more of the court. The court has been indulgent. Captain Genereaux did want to go to San Francisco tonight.

A. I must go tonight; all arrangements to go tonight.

Mr. Hayden: There are a great many things touched upon in the direct examination that I have

(Testimony of Emile C. Genereaux.)

not had an opportunity yet to cross examine on, but I will do the best I can.

A. Speed up now.

Q. Well, now, Captain Genereaux, assume that the bulwark rails were four inches wide or six inches wide, and assume that it was in, that is, lean-in on the rail of half an inch from the top to the bottom, and you butt your stanchion out against the bottom of this rail on the deck, at the bottom of the deck—

A. Do on some ships; some ships you don't butt it against the rail.

Q. That would give you the most tumble-home anyway you could get to your stanchion, if you put it right out against the bulwark rail at the bottom, you would have as much tumble-home as you could get to your stanchion anyway, wouldn't you?

A. No. You can put a block to the heel of your stanchion and get more tumble-home if it is necessary, which is done in a good many cases.

Q. Well, was it done in this case?

A. It was not done in this case, because—

Q. It was not done in this case. All right then.

A. It was not done in this case because the height of the deck load did not warrant it.

Mr. Wood: You mean the height of the deck-load as it was loaded?

A. As it was, yes.

Q. Well, Mr. Genereaux, you put your stanchions in as soon as you get your first layer down on deck?

(Testimony of Emile C. Genereaux.)

A. Not all of them, no. You make provision for them.

Q. You put in most of them as you start out your first tier on deck, don't you?

A. You put the off-shore side in, as a general rule. The inshore side are practically entirely left out. Provisions are made to slip them in after the deck load is partially on.

Q. You had them in on the off-shore side when you first started off, with the first tier on the deck?

A. I wasn't there when the deck-load was put on, so I could not say.

Q. You examined the off-shore side? There were not any blocks in there?

A. I didn't examine the stanchions.

Q. I thought you said you did.

A. I said I didn't know whether there was any blocking in there or not.

Q. How is it you can tell this court that the deck-load would be two feet away from the steering rods when you didn't make any examination at all?

A. I said, if the deck load had been continued that it could have been kept two feet away from the steering rods without any trouble whatsoever. At the present time the steering rods are practically three feet six higher than the deck-load.

Q. Now, I am going to put a proposition to you: Assume that there was no blocking at the rail, then we will assume that this is six feet and one-half

(Testimony of Emile C. Genereaux.)

inch high. You have got four feet you say was the height—

A. Of the deck-load.

Q. The height of the bulwark rail?

A. No, I said the height of the deck-load.

Q. How high did you say the height of the bulwark rail was?

A. Approximately the same.

Q. Four feet. I thought you said that. Now, you have a stanchion that comes up, butting up against the bottom at the deck. At the top, then, four feet above, that stanchion has a lean-in of six and one-half inches, has it not?

A. Yes.

Q. Then if you construct another structure exactly the same, another four feet high from that, that will be a lean-in of six and one-half inches, will it not?

A. Yes, sir.

Q. Now, if from this rail you run your stanchions which support your steering rods straight up at the top, you cannot have a distance of over nine inches and a half, can you?

A. Not according to your diagram, no.

Mr. Huffer: I offer that diagram in evidence.

Court: Very well, let it be admitted.

Marked "Claimant's Exhibit A."

A. I would like to make my own diagram showing it can be made 12-14-16 inches.

Q. You can make all the diagrams you want to.

(Testimony of Emile C. Genereaux.)

A. By securing a block at the rail to the stanchion.

Court: At the rail of the bulwarks?

A. At the rail of the bulwarks to the stanchion, you can tip it in just as far as you like, according to the size of the blocking which you might want to put in.

Mr. Wood: I will offer that diagram in evidence.

Marked "Libelant's Exhibit M."

Q. Now, Mr. Genereaux, you didn't say anything to the court, when you made that statement that this stanchion would be two feet, the deck-load would be two feet away from the steering rod, about a block, did you?

A. I had no reference to the stanchion whatsoever. I specified that the deck-load itself would be two feet away from the steering rods.

Q. If the deck-load spreads—and it does, you say?

A. I didn't say the deck-load spread. I said that the deck-load settled.

Q. What do you mean by settled?

A. Why, two pieces of rough lumber put together don't always properly meet. A little action at sea causes them to meet closer together, might reduce the height of the deck-load half an inch.

Q. Isn't it a fact that the deck-load spreads in the seaway?

A. The deck-load spreads?

(Testimony of Emile C. Genereaux.)

Q. Yes.

A. No. It sways with the ship.

Q. Isn't it a fact that with the swaying of the ship the deck-load actually gets wider at the top after the end of a voyage than it was when it started out?

A. No, because the lumber, as a general rule, dries up and shrinks, and with the tightening of the lashings whenever it is necessary, it narrows the deck-load up a little.

Q. We can get lots of kinds of testimony in cases. I have had them tell me it spreads as much as three inches in one day. I don't know whether you testified to that in the Strathalbyn case or not.

A. As I said before, owing to improper lashings it might spread all over the ocean.

Q. Isn't it a matter of fact when a ship is in a seaway, if this lumber is ten feet high, that the tendency of the throw of that ship back and forth will be to push it out?

A. The low side would have a tendency to push out, yes.

Q. Won't the top side, the higher up the more tendency?

A. The high side would have a tendency to go to the mast, wouldn't it, therefore the lumber on the weather side of the mast, with its lashings, would support the lumber on the lee side of the mast, so there isn't any possibility for the lumber to spread if it is properly secured. If it was, they wouldn't

(Testimony of Emile C. Genereaux.)

be carrying deck-loads. They would have given it up years ago.

Q. Now, this method of lashing that you talk about, and the turnbuckles, etc., is it your opinion, Captain Genereaux, that under no circumstances by such method of lashing as is ordinarily used on ships, under no circumstances can that come loose in a storm or otherwise?

A. I wouldn't say that.

Q. Then there is a possibility of a deck-load shifting even though it is properly lashed?

A. There may be other forces. The bulwarks might be weak. The rigging may carry away from the mast, which would cause the deck-load to loosen.

Q. Suppose everything holds, is there no way for a deck-load to get loose 10 feet high?

A. If everything holds.

Q. Everything holds in the ordinary way in a storm.

A. If everything holds, the deck-load could not get loose.

Q. Is there any effect of the pitching of a ship in a big storm, with waves running over the deck-load, that would in your opinion cause it to get loose?

A. Why, if it was a heavy storm like that, the ship could not run into it; she could not pitch into it; she would have to be hove to.

Q. Now, then, suppose that in this particular instance, when she is hove to, the steering rods are

(Testimony of Emile C. Genereaux.)

broken, then what happens—something goes wrong with the steering gear?

A. She falls in the trough of the sea.

Q. Then what happens to the deck-load?

A. Why, nothing at present, the ship begins to roll.

Q. And then.

A. It all depends on the stability of the ship.

Q. She may roll over, and she may not, eh?

A. The chances are not that she will roll over.

Q. How about the deck-load under those circumstances?

A. Why, if the ship rolls heavy she rolls down to the sea.

Q. What does it do to the deck-load?

A. It supports it.

Q. It supports the upper side when the sea is hitting it?

A. The upper side of the deck-load.

Q. Yes, that, you see, is leaning down on the rest of it.

A. If she is rolling the leeward way it is positive that the sea cannot be hitting her up on the weather side. The sea may affect her when she rolls to windward again, may possibly strike the deck-load.

Q. What I am trying to find out from you, Mr. Genereaux, is how you account for these deck-loads coming loose when they are properly lashed.

A. They don't come loose if they are properly

(Testimony of Emile C. Genereaux.)

lashed. It is deck-loads that become loose that are improperly lashed. A ship does not leak is she is properly caulked, but if she is improperly caulked she leaks. The same applies to these deck-loads.

Q. Do you say it is absolutely impossible—is it your opinion that it is impossible for a deck-load to come loose, lashed as you would lash it ordinarily on a ship?

A. I don't think it is possible for it to come loose.

Q. That is just what I want to know, your opinion about it.

A. If it is properly lashed—what I mean by properly lashed also refers to proper stowage of the cargo.

Q. Is it your custom, Captain, the custom now on these thousand ships you have loaded, is it the custom to have one of the ballast tanks empty when they go to sea?

A. It has been the custom for one to two tanks to be empty.

Q. On all these tramp ships that go to sea with a deck-load cargo of lumber?

A. I wouldn't say all of them. There may have been a few ship have gone out with full tankage.

Q. Those ships that go out with full tankage are probably taking more deck-load than those that go out with less tankage, are they not?

A. Not necessarily, no.

Q. Why not necessarily?

(Testimony of Emile C. Genereaux.)

A. It all depends on the amount of cargo that is carried; amount of—

Q. A ship with tanks full of salt water can carry more of a deck-load than one without, can it not?

A. It all depends on the construction. You mean the same ship?

Q. Certainly. Everything else the same.

A. Yes. Why, she would if she didn't go below her marks, she could, and draft.

Q. So, then, to get on a full and maximum deck-cargo of lumber, a ship is in a better condition with all of her tanks full than she is without all her tanks full?

A. No, I wouldn't say that, because some ships may be too stiff with all their tanks full.

Q. Will you put more deck-load on if she is too stiff?

A. Oh, no, there is a limit to all deck-loads.

Q. You mean a limit so far as building them up high is concerned, or a limit so far as you can put on the ship is concerned?

A. A limit to what the ship will carry.

Q. That depends on the stability, of course, doesn't it?

A. Certainly; certainly. But it is not the custom to fill all the tanks in a ship with deck-load.

Q. Well, is that because you anticipate that on the voyage the cargo will become wet with water and cause instability in the ship?

A. The amount of water that green lumber

(Testimony of Emile C. Genereaux.)

soaks up does not practically enter into the matter relative to the excess weight that might be carried on deck.

Q. When you are surveying a ship do you not take into consideration the fact that the lumber in the ship may become wet, and that the lumber may hold a considerable quantity of water, and therefore affect the stability of the ship?

A. It does hold water, yes. There is always open spaces around where water will accumulate. Those factors are taken into consideration.

Q. Well, is that the reason that they don't fill up all the tanks down in the bottom, because they expect a quantity of water to remain in the deck-cargo?

A. No, I won't say it is. It is proven that a ship can load a reasonable amount of cargo with one or two, three or four of her tanks empty; doesn't state that the ship should fill them all. We have loaded steamers with two tanks out of the five full, and three empty.

Q. And stopped putting deck-load on, eh?

A. And put the regulation deck-loads on, yes, sir.

Q. Then you put the regulation deck-load—

A. Well, I will say a deck-load from 9 to 12 or 13 feet, 600,000 up to a million feet of lumber.

Q. Do you know how much water in a storm will be accumulated around a deck-load and won't roll off?

(Testimony of Emile C. Genereaux.)

A. That depends a good deal on the stowage of the lumber and what provisions are made for allowing the water to relieve itself.

Q. When you speak about stowage of lumber, Captain, all these spaces that are shown in this exhibit in here would be carrying water if a storm was breaking over the ship; all around the hatches, around the winches, in between the ends of the lumber.

A. She would be carrying excess water probably, yes.

Q. That all goes to affect her stability, doesn't it?

A. Yes.

Q. And has to be taken into consideration by the captain of the ship?

A. That is in the mode of a deck-load of this type. A full and complete deck-load is compact.

Q. Oh, well, it doesn't change—they simply pile lumber on top of that, don't they?

A. Yes. All those openings are closed up.

Q. They put loose deck-load on top of those openings, and those openings fill up with water, and it cannot run out as well as it might there?

A. Not necessarily. Water doesn't always get an opportunity to go down four or five or six feet through that lumber, if it is properly stowed. There are places the water will stay.

Q. I assume it is your opinion, Captain Genereaux, if this ship were in a storm and water wash-

(Testimony of Emile C. Genereaux.)

ing over the deck and you had four feet more lumber on this deck, that there would be no water accumulating in these spaces that are shown there.

A. I didn't say none.

Q. That is what I am talking about. If any gets in there, it will probably fill it up.

A. The amount of water on a ship's deck is governed just the same as a deep-loaded ship with coal. Her stability is figured out that she can carry her well-decks fore and aft full of water. There will be hundreds and hundreds of tons of excess over her limited amount of cargo.

Q. That is coal you are talking about?

A. I am talking of dead weight cargo on a deck.

Q. Of course, these lines of stability are all figured according to that. Now, you said something in your direct examination about being safer because you had a deck-load of lumber on properly tied, with this ship, than it would have been if she had no deck-load of lumber, because water coming over her deck would weigh more than the lumber and the water that would accumulate in the lumber. Is that what I understood you to say?

A. No, I didn't have reference to the weight.

Q. What did you have reference to?

A. I said the waves would not be so apt to come aboard with more deck-load as with the amount she had. If this ship was running in a heavy sea, she would have that deck flooded continually.

(Testimony of Emile C. Genereaux.)

Q. You mean from top rail to rail would be flooded continually?

A. Yes, she would have water on all the time.

Q. Don't every ship at sea have methods for relieving the deck of water?

A. Yes, but the openings are not large enough to allow the water to run out as fast as it comes in.

Q. Do you mean to say that that ship at sea—it is your opinion that that ship at sea would have her decks chock flush with water?

A. I say this ship with a gale of wind, running before it, she would have water on her decks continually, yes.

Q. I don't doubt that, but I am asking you if you mean to say it would be flush with water up to her bulwark rail, both decks.

A. I would, yes, running before it in a heavy gale of wind. I am speaking from not only experience I have had in sailing vessels, but from conversations I have had with ship masters who have handled these ships, and have gone with small deck-loads. They always advised that the ordinary deck-load was much safer than the small deck-load.

Q. How about that being good seamanship, to run your ship before the wind, when it would fill both—

Court: I don't think you ought to go into the seamanship.

Mr. Hayden: All right, your Honor. I just wanted to show the impossibility of what the Cap-

(Testimony of Emile C. Genereaux.)

tain is talking about. I will do that with our own witnesses, though, so he can get away.

Q. Now, you said, Captain, that what you intended to do when you made this survey, or started down to make your survey, was to put a considerable proportion of this seven hundred thousand feet on and then make another test. Am I correct in having understood you so?

A. I said that if I was allowed to continue, I would have pumped out two of the ship's ballast tanks; I would then ascertain with sling loads of lumber on her yard arms whether in my opinion to proceed loading; and after the major portion of this amount of extra cargo was put aboard, if the ship still was stiff with these two empty tanks, that I would have continued to the full amount, seven hundred thousand, giving the ship two reserve tanks to fill if necessary at any future time.

Q. Well, what I was asking you, Captain, was this: if you didn't say that, after you had loaded a considerable portion of this, if you didn't say it was your intention, after you had loaded a considerable portion of this seven hundred thousand feet on the decks, to make another test to see whether she would carry or not?

A. Yes.

Q. The reason for asking you that question was to ascertain how definite and certain you are as to whether she would carry seven hundred thousand, without making that other test.

(Testimony of Emile C. Genereaux.)

A. May I read my report relative to that?

Q. No. Answer the question. I don't care to have you read your report. Let me see your report. I would just as soon read it.

A. I can answer it from this report.

Court: Well, answer it from the report.

A. After careful examination of vessel it is our opinion that vessel can carry seven hundred thousand feet of lumber on deck. We further recommend, after the major portion of the above mentioned seven hundred thousand feet was placed on deck, a further survey be held to ascertain the correct amount the vessel should carry.

Q. So you were not sure that she could carry seven hundred thousand, were you?

A. No, sir. In our opinion we were, but we was not positive.

Q. Do you know what is the ordinary metacentric height for an ordinary cargo steamer loaded with anything. The G. M.—the ordinary G. M.

A. No, I don't know.

Q. You don't know?

A. No.

Q. Are you familiar with this little book here called "Know Your Own Ship," as to whether or not that is authority among shipping men generally?

A. That is the opinion of one ship-master.

Q. Well, do you know whether that is used quite generally?

A. It is read a great deal.

(Testimony of Emile C. Genereaux.)

Q. I want to ask you whether you agree with this statement or not: "The exposed timber on the decks absorbs moisture from spray or rain, and water is trapped in the interstices of the load. The deck load, therefore, increases in weight, and the C. G. is raised further until the metacentric height is negative." This is from page 206.

A. Yes, sir.

Q. Now, let us see, Captain, isn't it a matter of fact that as a general rule the deck-cargoes on ships going through a period where there are storms is usually wet?

A. It is.

Q. Then how do you account for that statement of yours that they dried out?

A. I didn't say they dried out. I said that the green lumber as a general rule didn't absorb very much water. The amount of water that is taken on that deck is offset by the amount of coal that is burned from the top with the opportunity for filling reserve tanks.

Q. Now, you talked, captain, about the coal that is burned from the top being offset by the amount of water that is accumulated in the cargo. The cargo on deck is above the center of gravity, isn't it?

A. Yes.

Q. And the coal that is on deck is above the center of gravity?

A. Yes.

Q. If you burn your coal off that is above the

(Testimony of Emile C. Genereaux.)

center of gravity you still leave the weight of your cargo on deck, don't you?

A. Yes.

Q. Therefore you have got a heavy structure—it is heavier on deck; there is more weight proportionately above the center of gravity than there is below it, isn't there?

A. Not necessarily.

Q. If you have 500 tons of coal on deck and 200 tons of lumber on deck, and you burn 500 tons of coal out of your ship—say she has 1200 tons altogether and you burn all but about 250 tons out of your ship—you have got more proportionate weight by 500 tons on your deck than you had when you only had 250 tons in your hold?

A. No, I don't see it. You have got 250 tons of coal in the bottom of your ship, where originally you had your coal distributed from the top to the bottom of your ship.

Q. You started out originally, Captain—get my idea—you started out originally with 500 tons on deck?

A. Yes.

Q. You had 500 tons of coal on deck, you burned all that 500 tons that was on deck down to 250 tons, and still have 500 tons more on deck than you had with the 250 tons in your bottom, hadn't you?

Mr. Wood: Are you attempting to state facts in this case?

(Testimony of Emile C. Genereaux.)

A. What are you trying to do—leave the coal on the upper deck?

Mr. Wood: If you are talking about this case, you had 500 tons of coal on deck—

Mr. Hayden: I am trying to get through here by five o'clock.

A. You have three minutes.

Q. I would like to have some more time with you.

Mr. Hayden: If your Honor please, I want to accommodate Mr. Genereaux, and I will close my cross-examination now; give Mr. Wood three minutes for anything else.

Mr. Wood: I would only like to clear up one point I am not certain on myself.

Q. (Mr. Wood). Captain, you were speaking of the difference between the height of deck-load in summer and winter seasons. Do you make that difference when the ship is not loaded down to her marks, or only when she is loaded to her marks?

A. Only when she is loaded to her marks.

Excused.

Adjourned until Monday at 2 P. M.

Portland, Oregon, December 15, 1919, 2 P. M.

ANDREW HOBEN, called as a witness on behalf of the Libelant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Wood:

Q. Captain Hoben, will you please state what experience you have had as a master at sea and also as a marine surveyor?

A. I have been something over 20 years ship-master, and I have been twenty-nine years five months a marine surveyor in Portland, Oregon.

Q. Marine surveyor for whom?

A. Well, I am for the British corporation. I was for the French Bureau Veritas and the Italian Veritas. I left the French about six or seven years ago. And also I was for the San Francisco Board of Underwriters for about 15 or 16 years, but I am the Wheat Association surveyor. I survey for the Board of Marine Underwriters now, but I am not for the Board exactly. Captain McNaught is the Board surveyor. Business got so much that I had to look after the wheat and flour ships more, but I survey lumber all along, all the time.

Q. What is the British corporation?

A. Corporation for the classification of ships, the same as Lloyds' or Veritas; and the Italian is the same.

Q. What experience have you had particularly

(Testimony of Andrew Hoben.)

in surveying lumber cargoes leaving this port, including deck loads?

A. Oh, I have been at it since I have been here, all the time. I did more of it years ago than I have done lately, but I am surveying lumber cargoes all the time. I have surveyed this year three Japanese ships, five or six of the Shipping Board ships, and some schooners.

Q. You mean with lumber cargoes?

A. Lumber cargoes, yes. I am speaking of lumber cargoes.

Q. Including deck-load?

A. Well, these Shipping Board ships are loaded with flour below and some lumber in between decks; but a deck-load for Panama, we have carried lumber on four or five of them, gig deck-loads. I might state, Mr. Wood, that up till about twelve or thirteen years ago I surveyed all the lumber cargoes that went out of this port, either myself or my assistant, who was MacIntosh's brother, but the business got so much that I could not attend to it.

Q. Well, you are still surveyor for the San Francisco Board of Underwriters on grain cargoes?

A. Yes, what they call the Wheat Tariff Association. And also I am assistant surveyor to Captain McNaught on lumber ships if he cannot get there. And then I survey for firms independent of that. I survey for the China Export and Import all their ships which they load, before the war about 24 a year—two a month; but when America got in

(Testimony of Andrew Hoben.)

trouble they went out of existence for the time being, as they were Germans.

Q. Did you make a survey of the Saigon Maru before her departure on this voyage to Bombay some time around June, 1917?

A. I made two surveys, made a survey before she finished and made a survey after she finished in company with Captain Genereaux.

Q. I didn't know you made two.

A. Well, the first survey was for to see what she would carry, and recommend, and after she was finished we made the survey to see what she took; get her drafts and freeboard, to finish it with the finishing survey.

Q. Well, in your opinion what could she have carried on that voyage as a deck-load?

A. Well, we went into the figures of the ship and got her molded dimensions. We figured she ought to take on that voyage about seven hundred thousand feet or more.

Q. Did you see the deck-load she did carry?

A. Yes, sir. When we made the final survey we seen that. That is what the final survey was, to see what she had on deck, and get her drafts and freeboard.

Q. Was that anywhere near a full deck-load for her?

A. No deck-load at all. It was what I would call a part of a deck-load.

Court: Do you mean 700,000 feet?

(Testimony of Andrew Hoben.)

A. No, what she had. 700,000 feet would be a full deck-load in my opinion; but what she had at the time she finished I didn't consider it any deck-load at all. That is what you asked me, Mr. Wood, the deck-load when she was finished?

Q. Yes, that is right.

A. Yes.

Q. Approximately how high would a deck-load of 700,000 feet come on her?

A. Somewhere about 11 feet; perhaps $11\frac{1}{2}$.

Q. That is forward?

A. Both; mean.

Q. Mean.

A. Yes, both ends.

Captain Genereaux, you may remember, testified, I think he said about ten feet forward and about eight feet aft. You would differ with that, then.

A. I would differ there. I think it would go about 11 feet; perhaps more. It would depend upon the stowage.

Q. What reason did the Japanese captain give to you at the time you made your survey for not carrying more?

A. He didn't give no reason at all. He said that was all he was going to carry, and he stuck to it.

Q. Well, didn't he say anything about his steering rods?

A. Not to me. He didn't mention that, because he was not coming up as far as the steering rods.

(Testimony of Andrew Hoben.)

Q. Well, you mean with the deck-load he carried?

A. Oh, if he carried a deck-load; but he told us he was only going to go about as high as the rail.

Court: That was with the 241,000. How high would the 700,000 go?

A. That would have fetched it up about four—about three feet above the ends of his rods.

Court: Above which?

A. Above the steering gear; about three feet above the steering gear. I consider 700,000 feet would be about 11 feet, comparing with other ships of her size, or 11 feet six.

Q. Captain, have you loaded deck-loads on other vessels having this same type of steering gear?

A. Yes, quite a few.

Q. What would you say to the court about the practicability of making those deck-loads safe and secure so they would not shift against the steering rods?

A. Well, after we come up above the rail there would be about three or four inches, when they come up above the rail, and as we come up higher we slope them in a little, so that when the deck-load would be on there would be about a foot or a foot and a half from these rods. These lashings would go on, it would not shift that much. You know we kind of shingle it in as we go up to the peak, in case it would go.

Q. Were you in the room when Captain Gener in

(Testimony of Andrew Hoben.)

eaux was testifying about those upright stanchions for lashings?

A. I was only here part of the time.

Q. Well, it is a fact, is it not, that the deck-load is secured on the outside by heavy upright stanchions, placed upright next the rail?

A. Yes, sir; according to the deck-load. We figure, if it is a ten-foot deck-load, we put on a fourteen-foot stanchion, and if it is about twelve feet deck-load we put on a sixteen-foot stanchion, so there will be enough to form a kind of bulwarks or rail for the safety of the cargo.

Q. About how close together would these stanchions come?

A. Eight to ten feet. We just place them so they fit, you know, between the stanchions. Oh, it is about eight to ten feet.

Q. Now, if you had loaded a deck-load of 700,000 feet or more on this vessel, could it have been secured so that it would not have endangered the steering rods?

A. We always have secured them. I never heard no complaints since I have been here. I loaded the *Queeta*—that is the only ship I remember now—twice; the Captain is a particular friend of mine. Her steering rods were the same. I loaded her twice here about fifteen years ago, and I never had no complaints from him about it.

Q. Did she carry deck-loads up above her steering rods?

(Testimony of Andrew Hoben.)

A. She carried deck-load up above her steering rods, certainly.

Q. What do you say as to the possibility of a deck-load properly secured with stanchions and lashings shifting?

A. It will shift a little, but not enough for to hurt the stanchions. It will move a little, you know; but she can be secured so it won't go against the stanchions, excepting in a rare case; it might, you know. The ship might get smashed up, let alone the deck-load. But the chances is there is no danger.

Q. Can the deck-load be secured so that it will not shift enough to make the ship tender or capsize?

A. I have never known it—the way it is lashed it cannot go past the mast. Of course, the deck-load may sag a little, you know, and if the ship is tender, might give her a little list; but I have never known anything to be serious.

Q. Have you any idea about how many ships you have surveyed and sent out of this port with deck-loads?

A. Quite a number, but I could not give you no figures on that.

Q. Well, in the hundreds?

A. Yes, in the thousands and in two. You know in 29 years—years ago I used to survey perhaps one hundred in the year or more. I have loaded wheat ships 148. That is the biggest season I ever had in Portland. For six or seven years I don't suppose I surveyed over thirty or forty a year.

(Testimony of Andrew Hoben.)

Q. Have you sailed in the Indian Ocean?

A. Yes, sir, and loaded there. I loaded two cargoes. I loaded a cargo once in 1883, 1883 on the coast of Madras. I loaded in Madras and three other ports. I had the four ports. That would be in about the end of July or August. I have also loaded a cargo in the latter part of October in Calcutta, come down the Indian Ocean.

Q. In July or August is the period that the Japanese captain has mentioned here as being in the southwest monsoon season.

A. That is right.

Q. He has said that the southwest monsoon season was a dangerous season in the Indian Ocean, in that it made a long heavy swell, rolled his ship, and so on. I want you to state to the court what your knowledge of the Indian Ocean is at that season.

A. It is more like a mill pond. It could not be very rough when I loaded on the lee shore in four ports in July and August, and these small surf boats would carry four ton and go out to the ship and lay alongside the ship, and take the cargo from them.

Q. Did you lie at anchor on open coast?

A. On open coast. Each of the ports was open that I mention; open, laying along the shore, and the wind was blowing along the coast, but a little on the southwester; the southwest monsoons is the summer season in India; and ships that load around the coast of India and sail on the coast of India are allowed to load five to six inches deeper than they

(Testimony of Andrew Hoben.)

are in any other ocean in the summer season; so it can't be so very rough, when the British Admiralty and the British Corporation and the French will allow ships for to load on that coast deeper in the southwest monsoons in the summer season, what they call Indian summer season, they are allowed to load deeper than anywhere else.

Q. You showed me, Captain, some diagrams or charts illustrating the load line for different seasons in those seas. Have you those with you?

A. Yes.

Q. Produce those, will you?

A. This one is the Bureau Veritas. This is the British Corporation. This is the Freeboard, the plan of the Freeboard. Now, this is summer—

Q. Just wait a minute. I will offer it, Captain, and then I will ask you to explain it. These are the rules for freeboard of the British Corporation?

A. Yes. It is the same as Lloyds', copy of Lloyds.

Q. And just so counsel may understand "I. S." here?

A. That is Indian Ocean or Indian Summer, which you like.

Q. "Indian Seas," I think it says down here.

A. Indian Summer.

Mr. Hayden: "Indian seas in summer." I object to the introduction of that, if your Honor please, on the ground that this ship was not in the Indian Seas in the summer. It was winter.

(Testimony of Andrew Hoben.)

A. It was summer the same as here.

Court: The same as here?

A. Yes, all through July and August are the summer.

Mr. Wood: It is north of the equator, isn't it?

Mr. Hayden: That is the fine weather season in the Indian Ocean?

A. It is the fine weather season I am talking about—July and August, Indian summers.

Q. There are the northeast monsoons in the Indian Ocean, aren't there?

A. Yes, but that is not the summer. That is the winter season.

Mr. Hayden: Which way is the wind when you get there in July and August?

A. Southwest. In winter it is northeast. That is the Indian summer time; it is the same summer that we have got. We are in the same latitude like.

Mr. Hayden: I don't think, if your Honor please, that that sheet is competent as proof of the regulations that are adopted generally by ships or even of this Association.

Court: What is that issued by?

A. British Corporation. They are the same as Lloyds. Lloyds has got the same. These I got so that I could mark on the ship's side.

Court: You loaded these ships in Calcutta?

Mr. Wood: No, your Honor, but he has to use this in loading ships in this port for any of these seas.

(Testimony of Andrew Hoben.)

Court: Oh, I see. I will overrule the objection. You may have your exception.

Marked "Libelant's Exhibit N."

Q. Now, referring to Libelant's Exhibit N, Captain Hoben, will you please explain to the court and us gentlemen.

A. This is summer.

Q. What is this circle here marked "B C," with a line through it?

A. That is what they call the mark on the side, the freeboard mark.

Q. That is what is known as the load mark of a vessel?

A. Yes.

Court: There are two "B C's".

A. This is for sailing ships and this is for steamers.

Q. The left-hand one is for sailing vessels, the right-hand one for steamers, marked here?

A. Yes, sir.

Q. To the right of the circle marked "B C" is one mark, and commencing at the bottom of that is a black line with "WNA."

A. Winter North Atlantic.

Q. Does that mean the depth to which you can load vessels going on the North Atlantic in the winter?

A. Yes, you cannot load them deeper than that.

Q. And this "WNA" has reference to the load mark "BC", has it not?

(Testimony of Andrew Hoben.)

A. Surely, sure.

Q. If "BC" is the normal load mark then "WNA" means a lesser draft for the vessel?

A. Sure.

Q. And going next above what does "W" mean?

A. That is winter for any part of the world.

Q. Except the North Atlantic?

A. Yes.

Q. And going next above what is the line marked "S"?

A. That is summer for all parts of the world.

Q. Load the vessel deeper in the summer?

A. Yes, that means to here. You see the line running through here.

Q. That is equivalent to the normal loading mark "BC"?

A. Yes. That is in salt water.

Q. Now, still above that is a line marked "IS".

A. That is the Indian Ocean summer. Indian summer.

Q. The legend down here at the bottom of the page further explains those marks, does it not?

A. Yes.

Q. The letters "IS" signify "Freeboard in the Indian Seas in Summer."

Mr. Hayden: Now, if your Honor please, before you pass on that objection, I want to call the court's attention to my objection again. I am reading now out of Lloyds' calendar. I am objecting to it that this does not show conditions of the weather pre-

(Testimony of Andrew Hoben.)

vailing at the time this ship was down there. "The fine season in the Indian Seas between the limits of Suez and Singapore is defined by the Government of India as prevailing east of Tuticoran from the 15th of November to the 25th of May, and west of Tuticoran from first of September to twenty-fifth May." So that in the season that this was down there, what they call the Indian Summer season is from the 15th of November to the 25th of May. And this ship was not in those waters during that time.

Mr. Wood: Pardon me, Mr. Hayden.

Mr. Hayden: You may take that and examine the captain in regard to it. That is Lloyds' calendar.

A. The Indian summer commences in the spring in May. Nobody can get out of that. They are in the same latitude. And the winter commences in the fall.

Mr. Hayden: Well, I am reading you from Lloyds'.

Mr. Wood: There it is, Captain, if you want to read that and make any comment on it.

A. No. That is the Indian summer (referring to Exhibit N), and Indian summer commences in the spring, the same as we do our summer. I am speaking of summer, Indian summer. It is in our latitude north.

Mr. Wood: I don't know what relation Tuticoran has to this particular voyage.

Captain Cullum: Tuticoran is on the northeast corner of the Island of Ceylon, and the Indian sum-

(Testimony of Andrew Hoben.)

mer is reckoned from Suez to there. The latitude of Suez is somewhere in the neighborhood of 29 degrees north latitude, and the latitude of Tuticoran is in about 7 north. So the monsoons there go from seven north to twenty-nine north.

A. I loaded all along this.

Captain Cullum: You loaded along Madras down there.

A. Yes, along there in July and August. Would the wind blow this way?

Captain Cummmum: No, you are on the lee shore, southwest lee shore.

A. Up here. Blows right along here.

Captain Cullum: Excuse me. That is southeast. Southwest is on the lee shore.

Mr. Hayden: That is the summer season in the Indian Ocean. It is entitled "Indian Summer Freeboard." These are the remarks that pertain to that Indian Summer freeboard in Lloyds' register.

Court: Is that territory south of the equator?

Mr. Hayden: No, it is north of the equator. It may be summer season so far as time is concerned, but the summer season with reference to the Indian freeboard, their summer season is different from our summer season.

Court: What do you mean by freeboard?

Mr. Hayden: The line to which the ship may be loaded down with safety; that is, that line to which it may be loaded down with safety is the bottom line, and the freeboard is the distance above it which gives it the buoyancy.

(Testimony of Andrew Hoben.)

A. I always understood different when I was out there; the summer season commenced the same as ours in April.

Mr. Hayden: With that explanation, your Honor, I renew the objection.

Court: Well, the objection seems to be a valid one, but I am going to let this go in so the court may have the whole matter before it.

A. The other is French, ain't it?

Q. Yes, French. The other is the same thing.

A. Yes, the Bureau Veritas.

CROSS EXAMINATION.

Questions by Mr. Hayden:

Captain, this vessel had on deck 241,560 feet of lumber?

A. About that, I suppose. Of course, that is the figures they give us.

Q. Have you any of the figures with you now from which you made up your report?

A. The figures we make our report is as to the quantity she ought to carry. That is what you want, eh?

Q. Yes, that is what I mean. Have you those figures with you?

A. No. We make up——

Q. Well, Captain, just a moment. Have you the figures of the height of the cargo on forward deck?

(Testimony of Andrew Hoben.)

A. Somewhere about six feet, as close as we could measure it.

Q. And the height of the cargo on the after deck?

A. Four feet as close as we could measure it.

Q. Now, was that cargo stowed the full length of the after deck and the full length of the forward deck, and full width of both decks?

A. As near as they could get it. The lengths don't always come out, you know.

Q. And there was six feet forward and four feet aft?

A. Yes, sir.

Q. About how high would you say the cargo ought to have been taken on this vessel—eleven feet and a half?

A. About.

Q. You would then put five feet more on the forward deck?

A. Yes.

Q. And seven feet and a half more on the after deck?

A. Yes, sir.

Court: That would make it how high?

A. Eleven feet.

Court: Eleven feet forward?

Mr. Hayden: Eleven feet.

Q. Now, you say in your opinion she ought to take 700,000 feet more?

A. Certainly.

(Testimony of Andrew Hoben.)

Q. As you go up, as I understand you, Captain, the deck narrows in? In other words, because of the lean-in of your stanchions there is not so much width to the decks?

A. It means 700,000 altogether.

Q. On deck. I understand that.

A. Yes; not more.

Q. Yes, I understand. I didn't mean to say more, if I did. Now, as you go up your stanchions lean in, do they not?

A. Very little, only they would when we keep them clear of them steering rods forward, not so much, they always cant in a little, you know.

Q. Well, then the tendency is to lessen the width of the deck cargo as it goes up?

A. Oh, it wouldn't be very much; might be perhaps a foot and a half altogether.

Q. That would be about nine inches on each side?

A. Somewheres about that. Sometimes it ain't that much.

Q. So the measurement across the deck would not be any greater at the top of the load than it would be at the bottom of the load?

A. It would not be quite so much.

Q. The length of the load would be about the same, wouldn't it?

A. Yes, certainly. Sometimes a little more, because it run over the forecastle head a little.

Q. Is there very much difference, Captain, in

(Testimony of Andrew Hoben.)

the quantity of lumber that you stow after you get four feet above the deck than there is while you are down on the deck?

A. The first foot of lumber you would put on deck would be about 15,000 at each end—about 30,000. On the second foot you might put 35,000. On the third foot you might get about the same. But when you come above the hatch, then it would go different altogether, and when you would get above the winches, you would still have more room on deck.

Q. I was looking at this proportion. She had 241,000 on deck as she lay, and that is one-third substantially of 700,000.

A. Yes.

Q. Now, if she had six feet on deck forward, if you multiply that by three, she would have eighteen feet forward; if she had four feet on deck aft, multiply that by three, you would have twelve feet aft. Will you explain how you figure to get that down?

A. Yes. You know yourself that there is the big hatches at both ends. There is pipes runs outside of them hatches that there is more than half of the deck taken up till you get above the hatches, and the first two feet you put on a ship's deck don't amount to very much, three feet sometimes, providing she has got high coamings. You will put more in one foot when you get above than you would in three feet on her deck.

(Testimony of Andrew Hoben.)

Q. After that then the proportion would be the same, would it, as you went up?

A. Not till you get above the winches. When you could get above the winches and go right fore and aft, except leaving enough of space to get the falls down to the winches. After you get up six or seven feet, six feet say, or seven, then you could carry perhaps eighty-five to ninety thousand to the foot where you were carrying on the first tier perhaps thirty thousand or less on the main deck. Now, them figures is only what I am giving you roughly speaking.

Q. I understand, Captain; I am just trying to clear up the situation.

A. You know the hatches, Mr. Hayden, takes up—

Q. They take up lots of room. That is why I am trying to clear it up.

A. Well, I can give you the whole of it. I have had a lot of experience with loading ships.

Q. Now, have you, Captain, made any figures at all that would indicate the proportion of the various steamers, that they carry on deck compared with what they carry in the hold?

A. Well, of course I got it rough, but I never went into that business.

Q. You have never figured out what the proportion is, have you, for various steamers?

A. No. They ought to figure twenty-five per

(Testimony of Andrew Hoben.)

cent or more on deck. I don't go into that. I load a ship.

Q. Your general idea is that they ought to figure 25 per cent or more?

A. Yes, or more.

Q. Then it is your experience, isn't it, Captain, that each ship has its own peculiarities so far as carrying a load is concerned?

A. Not on tramp steamboats. Tramp steamboats is all pretty near built alike. There is very little difference in them. They are built to carry a cargo.

Q. They are what is known, are they not, Captain, as fine tramps and rough tramps?

A. No, sir, I have never seen any of them. The British-built tramps is pretty near built on the same lines; they are built to carry cargoes. If you are building a ship for a certain voyage, or certain voyages, carrying light cargo, and want to make passage, then you would get them built more finer; but the tramps is always pretty near now about the same, very little difference in them. That is my experience.

Q. Do you mean to say that the "Saigon Maru" was one of the ordinary tramp ships in your opinion?

A. Yes, certainly. Both by her measurement, her length, her beam and her depth. She was about an ordinary tramp.

Q. Did you look her up, and didn't you find,

(Testimony of Andrew Hoben.)

as a matter of fact, that she was a deeper ship than the ordinary tramp ship?

A. She was a little deeper, but she had a good beam; she had a big beam for her weight.

Q. Now, Captain, they have handed us here some books, showing various deck loads of lumber were stowed on tramp ships, and I want to call your attention to these just so that I may subsequently ask you for an opinion as to why the variation. The ship *Shintsu Maru*, do you know that vessel?

A. I couldn't say I do.

Q. Carried two million four sixty-four thousand three hundred and sixty-three feet under deck.

Mr. Wood: Mr. Hayden, aren't you wasting time? He doesn't know the vessel at all.

A. Mr. Hayden, let me explain a little. There is some of these old steamboats that was built for certain trades, and they are very fine. They were sold to the Japs. I have had them here. And the old *Dollars* would not carry any deck load. I mean the ship was built for a tramp steamboat. Now, the Japs has bought a lot of them old ships. I have had them here—and would not carry any deck load. But she was built for the tea trade, the Indian tea trade, or something. When she got pretty old the English firm sold them over to the Japs. Now, they were not what I call tramps. They would not carry any deck load.

Q. Just going along with the *Shintsu Maru*, ac-

(Testimony of Andrew Hoben.)

cording to these books libelant has furnished us in this case to examine, 2,464,363 feet; and she carried on deck 110,048 feet, which is 4.4 per cent.

A. Oh, well, she might be something like the old Stanley Dollar. I put two feet on her one time on her deck and nearly capsized her.

Q. Now, the Croydon was another vessel, and she had under deck 2,217,041 feet and on deck 301,354 feet. That works out a percentage of 13½.

A. Yes. But you get ships that carry regular deck load that I could give you, and you will see. Now, I will give you Japanese ships, the "Maru" are loaded in June last, I will give you the figures; come in and look at them.

Q. All I am doing, Captain, in connection with your testimony—I think it is becoming very apparent that a great deal depends on the ship.

A. All on the ship.

Q. The Kenkon Maru II loaded 1,861,137 under deck, and she loaded 226,032 on deck, which is about 12½ per cent.

A. Yes. Now, there is another thing, Mr. Hayden. Them ships might be shelter deck ships. I don't know their dimensions. If she has got a raised deck you cannot put anything on, because there is seven or eight feet already of a raise on, see. That is, I mean she is closed in over the bridge deck to the forecastle and to the poop; no wells.

Q. Well, here is the Bannockburn. She carried

(Testimony of Andrew Hoben.)

three million one hundred and eighty-five thousand seven hundred and ninety-six feet and on deck she carried four hundred and sixty thousand four hundred and twenty-six feet, which I work out as a percentage of 11.3

A. Yes. But as I said before, them ships might have shelter decks all over. I have loaded several of them, and we put about five feet on the deck all over, on them ships that has got a shelter deck all over.

Q. Now, then, on the Strathlay, she had under deck 2,466,762 feet and she had on deck 1,061,000 feet, which is over 43 per cent.

A. Yes, but they are very big carriers, and them ships the captain has got to carry a big deck load; if not, they have to have their bag packed when they arrive.

Q. That is what I am saying: There is a lot of difference in ships in carrying capacity.

A. Yes. If they are shelter deck all over, then you cannot carry deck load. But the Straths is all big carriers.

Q. I will check up and see whether these boats I have referred to are shelter deck or not. I don't think they are, but I will check it up and see. Now, then the Strathdeen carried under deck 2,628,601 feet and carried on deck 1,011,343 feet, which is 38.4 per cent.

A. Yes.

Q. And the Strathblane carried under deck 2,-

(Testimony of Andrew Hoben.)

632,507 feet and on deck, 1,069,221 feet, which is 40½ per cent.

A. But they are extra carriers. They were built for lumber.

Q. Yes, Captain, and the Strathgyle carried under deck 2,704,573 feet and on deck 1,125,202 feet, and she carried 44 per cent on deck. Now we come to the Strathearn, which is a vessel of the same size so far as her dimensions are concerned, 370 feet long by 52 feet 2 inch beam.

Mr. Wood: Don't state these things in the record like that. That is 20 feet longer than this one, and how many feet wider?

Mr. Hayden: I know. These are vessels that appear in your own records.

Mr. Wood: You say she is the same type and dimensions as this "Saigon Maru."

Mr. Hayden: No, no, I am not saying this. I am introducing this to show that this customary testimony you are introducing here is not worth very much as far as its weight is concerned. Every ship has its own peculiarity, and you cannot judge one ship by another.

A. Mr. Hayden, all them Straths is built on the same mold, and they are the biggest carriers we have had come to this port.

Q. They are wonderful carriers.

A. They are wonderful carriers—that is well known all over—especially of lumber. They don't carry deadweight, any more. It is their great beam

(Testimony of Andrew Hoben.)

and shallow. They are light schooners built on this type. But what I mean, I mean the ordinary built tramp, leaving the Straths out, the ordinary built tramps will carry from 25 to 30; that is about; taking the vessels that come in and out here, leaving the Straths out. They was built expressly for lumber, and the captain has got to carry it to keep them up; and them ships will get a charter here when no other vessel will get a charter to haul lumber.

Q. Now, another thing about those Strath ships is they are very blunt both ends? They haven't any fine run on either end.

A. They are more fuller than any other ship we have got coming in here. They was an order given for fourteen; when they were built they give an order for fourteen more. But I don't figure them exactly with the ordinary built tramp. I say the ordinary built tramp, take them all together, is about the same; that is, built to carry cargo—not passenger ship.

Q. Well, then, you would say the ordinary built tramp should carry from 25 to 30 per cent?

A. 30 per cent, yes.

Q. Now, that varies, of course, depending on the depth and breadth, doesn't it?

A. The breadth is what we look for. The breadth is what I figure it for to carry deck load. If I get a ship with good beam then she is going to carry a good deck load providing the captain is a

(Testimony of Andrew Hoben.)

good man and wants to carry one. It isn't our place to force a captain to carry a big deck load. On the contrary, if he is going to put on a big deck load, and I see the ship tender, I am going to stop him.

Q. That is the proper thing to do.

A. I can't compel him to put a deck load on, because he is master.

Q. In other words, the master has considerable discretion about his ship in ordinary practice, hasn't he?

A. Yes, yes, certainly.

Q. And he knows more about his own ship?

A. Some of them do. But for loading lumber, if they never loaded before, they know very little about a deck load. They ask me, and they get their information from me all the time, as to how much they ought to carry. But if he wants to put on too much and the ship is getting tender, then I stop him right away. I go away from the ship. I tell him: "I will quit your ship." Now, Mr. Hayden, I would like you to come here and see. Here is a ship I loaded the very same size.

Q. Let us have whatever data there is. We will put it right in the record.

Court: What ship have you there?

A. The Shempo Maru.

Court: Have you that ship, Mr. Hayden?

Mr. Hayden: I haven't it here.

A. Shempo Maru, this ship I loaded in June.

(Testimony of Andrew Hoben.)

Q. What was her length, breadth and depth, please?

A. She is 360 feet long, 51 feet beam, 28 feet depth of hold. Her molded depth would be nearly 31 feet 6. I haven't got her molded depth. That is her depth of hold.

Q. How much did she have under deck, Captain?

A. 2,198,891.

Q. How much did she have on deck?

A. 735,499. Now that ship is about as near as anything I ever could get to the ship we are talking about. She is seven feet longer, nine inches broader and about the same depth of hold. Now, this ship, she had 1200 ton of coal, 1257 ton of coal.

Q. 1257 tons of coal?

A. Yes. But her consumption was 38 tons, and her speed was nine knots. She burned more coal. She had more power.

Q. She made more speed?

A. Made more speed. She had two empty tanks. She had about 70 per cent of her water filled when loaded. The height of the deck load aft was 12 feet; forward 11 feet.

Q. She had more aft than forward?

A. Yes; we put it that way to trim the ship sometimes.

Q. Where did she go, where was she bound for?

A. She went to Taku Bar and Shanghai. She

(Testimony of Andrew Hoben.)

was loaded for the China Import and Export, but I do all their surveying.

Q. What months did she go across?

A. She left here in June; about the same time as the other one left, isn't it?

Q. Yes. She was going to the northern part of Japan; though, instead of the Indian Ocean and China Sea.

A. Yes, leaving here in June. You go through the China Sea you have got summer; you go to Japan you have got summer; you go to the Indian Ocean you have got summer. I have followed that track around. And I am in the northern hemisphere all the time.

Q. We intend to show that that is during the months of the typhoons and monsoons before we get through. You have bigger storms than you ordinarily get.

A. What I mean is it is summer.

Q. I know; but if we get big winds in summer, that is what we are looking out for.

A. I never seen none of them, and I was around there a good deal. They come on in September, the latter part of September and October, like the West India hurricanes.

Q. They don't come on in June?

A. I never knew them.

Q. Don't come on in July?

A. Never known them. They might. I am not saying they don't.

(Testimony of Andrew Hoben.)

Q. Never come on in August?

A. No, I have never known them, and I have been around there a good deal.

Q. Well, haven't you found that out from your observation of the meteorological charts of the United States Government?

A. No. I didn't look it up though lately, you know. There weren't any of them around when I knocked off thirty years ago. I am giving you my own experience, Mr. Hayden. That is all.

Q. Did you see, Captain, the way the stanchions were fastened to the rail on the "Saigon Maru" on the after deck?

A. Certainly.

Q. Were there any blocks between the stanchions and the bulwark rail?

A. Always is.

Q. Were there on this ship any blocks between the stanchion and the bulwark rail, speaking of the "Saigon Maru," did you see them on that ship?

A. There was little blocks behind the heel of the stanchion but not so big. The stanchion was put up there so it would cant in, and the after end the blocks was not quite so big.

Q. Were there any blocks between the upper part of the rail and the stanchion?

A. No.

Q. Is that customary, to put blocks between the upper part of the rail and the stanchions?

A. No, sir.

(Testimony of Andrew Hoben.)

Q. They would not stay there, would they?

A. No, the stanchions go right against the rail. But the block is on the deck for to hold the heel of the stanchion solid till the timber goes against it. Sometimes they need it.

Q. The purpose of the block at the deck is so there will not be so much tumble-home to the stanchion, is it not?

A. Certainly, that is what it is for.

Q. That is customary to put on ships, is it?

A. Sure, sure. Sometimes we put them in under the bulwark stay, so they stay there. Sometimes they nail pieces in.

Q. Did you make any measurement, Captain, on the "Saigon Maru" to determine how far away from the steering rods, from the stanchions supporting the steering rods, the stanchions would be supporting the cargo?

A. We didn't, because he was not going to load up. He only loaded about the height of the rail, so it was not necessary. He might have been six inches above it. But if he had loaded a full cargo, the stanchions would have been perhaps four inches, as I say, at the top of the rail, and up to perhaps sixteen or seventeen, fifteen at the top, see, tumble-in; keep them away.

Q. Captain, what I was trying to get at was how far that tumble-in would carry the stanchions away from the steering rod, which is about four

(Testimony of Andrew Hoben.)

feet above the rail, three feet and a half above the rail.

A. I say it might be fourteen or fifteen inches or more, if she had carried a full deck load, the stanchions that go up would leave space about that from the rod to the deck load.

Q. Well, now, do you know the width of the top of the bulwark rail on the "Saigon Maru"?

A. It is generally about six inches.

Q. Generally about six. Do you know the tumble-home of that rail from the top of it down to the bottom?

A. It might be two or three inches.

Q. How much?

A. It might be two or three inches. Amidships it has not much tumble-home, but as you go aft it tumbles in more, and as you go forward it goes out.

Q. It is pretty nearly perpendicular, the rail is, as you are amidships.

A. Not much.

Q. Probably would not be half an inch there, would there?

A. Oh, there would be two or three inches in the eight feet; two or three inches in eight feet. It might be a quarter of an inch to the foot.

Mr. Wood: Just a minute, Captain. I don't understand you. What do you mean by eight feet when the rail is only four feet high?

A. I say amidships, where the bridge deck is,

(Testimony of Andrew Hoben.)

it might be four or five inches or three inches, because this bridge deck is eight feet above the main deck; or about eight feet. Well, there is a little tumble-in, you know. There would not be so much on the bulwarks, because that is only about three and a half feet high. But I mean the midship of the ship there might be a tumble-in on that bridge deck of four or five inches from this main deck to the top of the bridge deck. Generally is a little.

Q. Then you could figure about half an inch to the foot?

A. Somewhere along there.

Q. Or less than half an inch to the foot.

A. Somewhere about that. We never went into these figures very much because it is not necessary.

Q. Now, you spoke about the cargo shifting, and you said you could expect that in rare cases.

A. I mean a little. It will go a little.

Q. Now, what do you mean by shift?

A. I mean it will settle a little either ways.

Q. Either to the port or to the starboard?

A. Yes; and then settle back again in a heavy sea. It might go two or three.

Q. In other words, it would be moving more or less.

A. Well, if she was a good while on tack, and heavy seas hit her, it would settle a little, yes, you know.

Q. Have you any idea how much that would be?

(Testimony of Andrew Hoben.)

A. No, no, no, I never experienced that; but I know it does.

Q. In other words, then, there is in a high deck load a tendency for it to spread out?

A. No, it don't spread out. It will go bodily, the whole thing.

Q. Go bodily?

A. Yes, the whole thing will give a little bodily.

Q. That is, from the mast out?

A. No, it will go all together if it goes. The mast don't always hold it, you know, because it ain't built that firm around the mast.

Q. It all moves over to one side or the other?

A. It will go a little.

Q. What do you think of this idea that it would go out as much as three or four inches?

A. It might, but I don't think so.

Q. I asked you that question because that was the testimony in another case that I had; that you could not hold it.

A. I don't think it would go that far, Mr. Hayden; that is, providing you got good lashings and well secured.

Q. Now, while we are talking about it, while we are mentioning that, that makes me think—these ordinary tramp ships are not built with facilities to lash on deck load the same as the regular lumber carriers are, are they?

A. Well, they are not, but we find just as good places, because we put them through the mooring

(Testimony of Andrew Hoben.)

pipes, and we put them underneath the bulwark stays, and we put shackles into where the rigging sets up. We will find places.

Q. How many mooring pipes, do you know, were there on the "Saigon Maru"?

A. There would be about two.

Q. One on each end of each deck?

A. Two on each end.

A. Two on each end; one close by the break of the poop.

Q. One on the port side, one on the starboard side forward, one on the port and one on the starboard aft.

A. No, there is two on the port side forward and two on the starboard. There is generally about four.

Q. Four on each side?

A. Yes, the length of the ship.

Q. What is the length of the ship?

A. Yes, four on each side. Two abaft of the bridge on the starboard, and two abaft of the bridge on the port side, and the same forward. But there is a good place for to make the wires fast where the rigging sets up, and then underneath the bulwark stay you can never pull them out. It is hard on the lashings, hard on the wire, but that is the way we do it—reeve them underneath the bulwark stays; make the ends fast to the mooring pipes.

Q. Have you any lashings that go through the rail except in these hawse pipes?

A. Beg pardon?

(Testimony of Andrew Hoben.)

Q. I say on the ordinary tramp ship have you any lashings that go through the rails except in the hawse pipes?

A. Well, we put these lashings wherever we can put them, something that is strong that will be sure to hold. I would put them through the scuppers if I had nowhere else, and there is about three of them on a side; reeve them through and take them up over the rail.

Q. That is what you do with the hawse pipes, isn't it?

A. With the mooring pipes.

Q. Mooring pipes.

A. Yes.

Q. Now, then, these rail stanchions that you make the lashings fast to, how big are they?

A. They are about, I suppose, nearly an inch thick and six inches wide.

Q. How are they fastened to the deck, with what?

A. They are fastened with rivets.

Q. A couple of rivets to each side?

A. No, there is about four.

Q. Four rivets to each side?

A. Yes, there is an angle on each side of this bulwark stay, what goes up like that, and then they are riveted down to the deck on each side of the bulwark stay.

Q. Do you know the size of those rivets? Are they about half an inch?

(Testimony of Andrew Hoben.)

A. No, they would be about seven-eighths, I suppose, three-quarters. You wouldn't find any half-inch rivets in a ship excepting around the cabin.

Q. But these ordinary tramp ships haven't the same facilities for lashing a deck load onto it that they have on ships that are made to carry lumber?

A. The Straths has got nothing to make the lashings fast to only what we could pick up, the same as I told you, and they are built for lumber. The Dollar boats is fitted with lashings. I mean the new Dollar boats. And these boats that we load lumber for the Shipping Board, we have slabs on the deck, what they call slab, with four rivets in them, and eyes you loop the lashings into. But there isn't one of the Straths—I have loaded pretty near the whole of them, and they have got nothing more than the bulwarks, stays, or where the rigging sets up, or the mooring pipes.

Q. Now, Captain, how many of these ships, that is, tramp ships, that you know of, have gone out of here and have shifted their deck cargoes or lost part of them?

A. Since I have been here I know of two or three that has lost some, not very much, by the lashings carrying away.

Q. You mean the lashings themselves parting?

A. Yes. That is another thing; that is, if we get good lashings, there is no fear; but the way we pick up lashings, you know, on board of some of these tramps, we have to take what we get. It is

(Testimony of Andrew Hoben.)

pretty hard to get good lashings. There has been very little deck loads lost to my knowledge. A good deck load well lashed you are not going to lose it. You would lose that four-foot deck load quicker when you would lash it than you would lose a twelve-foot deck load, because if she would ship a heavy sea, get on top of that deck, it will flood that deck load around. The weight of the deck load alone, if it is well lashed, will keep it there.

Q. I notice here, Captain,—do you know the steamer Ellzer that loaded here in 1907?

A. Perhaps I did if I could remember.

Q. You don't remember now?

A. I loaded them at that time myself.

Q. I notice that that boat shifted her deck load.

A. Where did she shift it?

Q. She shifted it on her way to Taku Bar and Shanghai.

A. Wasn't she a Norwegian?

Q. The Ellzer, I think maybe she was.

A. Yes, I believe I remember that. A very heavy sea struck her and took the bridge deck and all and the foremast out of her, if it is the one I allude to. The captain, if it the same one, explained to me it is like a tidal wave, a big wave come; it was not very rough; come down just like a log and hit her—took the foremast out of her, if it is the same one.

Q. This is not the same one. This is another

(Testimony of Andrew Hoben.)

one. Is that the Azaman that went into Honolulu?

A. I forget now. Two or three steamboats lost in my time here part of the deck load, or a little through the lashings carried away; but that is very little, I can assure you there has been more ships lost with other cargoes than ever was lost, or lost deck load. The deck load, in my opinion, a good deck load well lashed makes the ship safer, and she has got more buoyancy, simply because she cannot carry any water on deck. The deck is filled up with lumber.

Q. Do you remember the Queen Eugenie?

A. No, sir. It would be impossible for me to remember, Mr. Hayden.

Q. I didn't know but what you might know them. The Queen Eugenie lost some of her deck load, too.

A. I admit we have had a few ships that lost, but not many. There has been never no serious loss by deck loads.

Q. 1914. I will just give you the date, Captain. She left in 1914.

Mr. Wood: Where did she leave from?

Mr. Hayden: Left from here.

A. Where did she lose her deck load?

Q. She was going over to Singapore. She lost part of her deck load on her way to Singapore. She lost it in the North Pacific, Captain. She did not lose it in the China Sea; she lost it before she got to Shanghai, I think it was.

(Testimony of Andrew Hoben.)

Mr. Wood: How much did she lose, Mr. Hayden.

Mr. Hayden: She only lost a little.

A. There has been lost a little. If you have good lashings, you are not apt to carry away after you get it secured.

Q. What is the effect of losing a part of the deck load on the lashings?

A. It don't affect anything.

Q. Doesn't it loosen up the whole proceeding?

A. No, sir, no, it is the top will go off, it is from one end, generally forward end, a big sea coming over her, plunge into her. You will get it lashed as soon as possible again. It is like a tarpaulin getting loose off the hatch, you will get it secured down again as quick as you can.

Q. Captain, if you have a deck load, say of ten feet on a vessel with a draft of 25 feet, if you have the same quantity of lumber on board of her as a vessel drawing thirty feet would have with a deck load of five feet, won't she?

A. She might.

Q. That is, if all the same—

A. She might be a very deep ship. You take the ships built in San Francisco, or the Standifer ships, they go out of here drawing 28 feet of water because they are shelter deck ships.

Q. No, I am talking without shelter deck at all. There is the same height of lumber from the bottom of the ship if the ship is 30 feet deep and carries a

(Testimony of Andrew Hoben.)

five-foot deck load that there is if she is 25 feet deep and carries a 10-foot deck load, isn't there?

A. I don't quite understand that.

Q. Here is a ship that is 25 feet deep.

A. Yes.

Q. She has a ten-foot deck load on her.

A. Yes.

Q. From the bottom of that ship to the top of that deck load is 35 feet.

A. Yes.

Q. Here is a ship that is 30 feet deep.

A. Yes.

Q. She has a five-foot deck load on her.

A. Yes.

Q. From the bottom of that ship to the top of that deck load is 35 feet.

A. Yes. But this ship here, drawing that depth of water, she would be very apt to take more ballast the more she would go down, and she must have more beam than this ship in proportion.

Q. You mean if she is 30 feet deep? I am talking about them having the same beam.

A. But if you get this ship 30 feet and 25, this ship must be a much bigger ship. If she is going to be five feet deeper, she must be a bigger ship. She ought to carry a whole lot more lumber.

Q. The size of a ship, you know, Captain, does not always depend on her depth.

A. But if she is the same as a tramp ship, if

(Testimony of Andrew Hoben.)

she has that depth she must have a bigger beam; she must be longer.

Q. It is not always the case?

A. It is generally the case, when you get a deep ship like that.

Q. I will take your own figures here, Captain, and find out about it.

A. Yes.

Q. The ship that you gave me a few minutes ago, the Shempo Maru, is 51 feet beam?

A. Yes, and 28 feet depth of hold.

Q. And 28 feet depth of hold?

A. Her molded depth about 31.6 I suppose.

Q. According to Lloyd's she is only 31 molded depth.

A. Well, I say about 31 or 31.6. I am only giving you what I think she is.

Q. And she is only 45 feet beam?

A. Oh, that is—you have got the wrong ship.

Q. The wrong ship, eh?

A. Yes, certainly.

Q. Whom does she belong to. There is only one Shempo Maru in this Lloyd's 1917.

A. How old is that boat?

Q. She is 1916-17.

A. Well, she might have been bought by these people since that time. She might be another name. That book is an old book. Maximotu was the captain. She was here last summer—loaded for the China Import and Export. I got these figures

(Testimony of Andrew Hoben.)

from the captain aboard of the ship, from his register, you know, which is the correct figures.

Q. Now, this vessel, this Shempo Maru has this distinction between her and the "Saigon Maru": She is 51 ft. beam, 31 ft. 6 molded depth; but you don't know that for sure, do you?

A. I am only——

Q. You know just what the captain told you?

A. No, he didn't tell me that. He give me her depth 28 feet. I didn't ask him for the molded depth, but I would figure that it would be about 31 or 31.3, something like that.

Mr. Wood: You just spoke to him now about the Shempo Maru. Do you mean the one he has been talking about or the one you found in Lloyd's?

Mr. Hayden: The one he is talking about.

A. There is very little difference between those two ships, because I have compared them. She is about six feet longer and nine inches broader. There is very little difference. You cannot get much closer than that on anything.

Q. Well, now, you don't think, Captain, do you, that because these two vessels happen to be about the same length, breadth and depth they ought to carry exactly the same cargo?

A. They ought to come pretty close to it when they are the same molded dimensions.

Q. Irrespective of the location of the weights on the ships?

A. What do you mean by the weights?

(Testimony of Andrew Hoben.)

Q. Well, I mean where the engines are placed in her, where the ballast tanks are in her. The way the houses are built.

A. They are all the same, the tramps. The engines are down in the bottom and the house is on top of the bridge deck.

Q. You say they are all the same?

A. Practically, I say, about all the same. Now, this ship could take much more of a deck load if there was a captain that wanted to take more cargo. But he was satisfied that was a good deck load, so was I, so was the charterers, and we all agreed on it, because he had over 300 tons of water yet he hadn't filled.

Q. Now, here is this little book, "Know Your Own Ship." You are familiar with that, aren't you, as one of the authorities that are used generally among seafaring men?

A. No, I have never read any of those books, because they are often written by men that don't know as much as I do about it, so therefore I don't consider they are worth reading. Some fellow is good at writing, and he writes them out.

Q. What I was going to suggest was this, Captain: That you recognize, do you not, that some tramp vessels are what are called very full vessels?

A. The tramp, the regular tramp, as far as I know, in my experience, which is more than any other man on the coast, and you know it—I am the oldest surveyor on the coast, perhaps anywhere.

(Testimony of Andrew Hoben.)

Q. I am not trying to question that, Captain.

A. No, no. In my experience with them, the regular tramps are so near alike that you can't tell the difference. If you changed the name you wouldn't know them. Now, if I wanted to write a book like that, I could give a whole lot of experience; but that might have been a midshipman, or something like that, that wrote that book.

Q. I want to ask you now just whether the "Saigon Maru" was a different shaped boat from the Strathern or not.

A. I say the Straths—

Q. Just answer that question yes or no.

A. The Straths is a little fuller. That is the only difference—a little fuller. They are fuller frames in the bottom. They are flat big beam, and they carry their floors away forward to the stem.

Q. Isn't there such a thing that you know about as the co-efficiency of—

A. No, I don't know nothing about that. That is going too deep for me. I work altogether on my experience and practice; not on figures. If I would work on all this kind of business I would have been out of loading the Shipping Board ships long ago, because the figures don't agree at all.

Q. A vessel which is cut away considerably forward and cut away considerably aft, and that is sharp on the bottom, is not as good a vessel to carry a large deck-load as one that is flat on the bottom

(Testimony of Andrew Hoben.)

and is not cut away so much forward and aft, is it?

A. Certainly not. But they don't build them ships as tramps. They build them more as passenger ships.

Q. Well, you are talking about building ships as tramps. Do you know what the "Saigon Maru" was built for particularly?

A. A tramp.

Court: What do you mean by tramp?

A. One go around and pick up cargo anywhere. A ship that is built fine is on a regular passenger and cargo route. She has got a bigger speed. It is over 13 or 14 knots. A regular tramp they are built for carrying cargo, carry big loads.

Q. Isn't it a fact, Captain, that some tramps are built to make speed and other tramps are built, not so much for speed, but for carrying?

A. There is very little difference. They are a nine-knot boat, they go about 10 on their trial trip, and when they are loaded they go 8—ordinarily speaking 8 knots—and they make about 7 at sea. Some of these vessels used as tramps now, that have been built for regular trade, they are faster; but as I say they don't carry no deck-load. They are sharp and fine.

Q. Captain, what is the prevailing direction of the wind during the months of July and August in the Bay of Bengal?

A. Southwest.

Q. And what is it in the Arabian Sea?

(Testimony of Andrew Hoben.)

A. I don't know.

Q. On which shore is this port of Madras?

A. That is the coast of Madras. It is one of the principal ports.

Q. But on what shore of British India is it?

A. It is one the east coast of India.

Q. Those other places that you mentioned are on the east coast, too, are they not?

A. Yes, just a little above, two or three hundred miles above.

Q. And the wind is from the southeast?

A. No, sir, southwest.

Q. Southwest, rather, during that period of the year?

A. Yes. When I was loading on that coast it blew right along that coast; it ranged along—came off the land at night.

Q. Those winds are winds that prevail in that neighborhood constantly, aren't they? That is how they get their name as monsoon?

A. They are like trade-winds, yes, they blow steady. If you are a little off the shore they blow steady; but if you are to anchor, they have what they call the land breeze and sea breeze. I beat down the Bay of Bengal from Calcutta through the southwest monsoons in 1884, a year after I was on the Madras coast. I loaded for New York.

Q. Now, Captain, what kind of winds did you experience? What was the velocity of the winds that you experienced during that time?

(Testimony of Andrew Hoben.)

A. Whole sail breeze.

Q. What is that as far as buffet is concerned?

A. I never took it. It is a nice summer breeze where you could carry all sail.

Q. How many miles an hour would that be?

A. Go seven or eight or nine—the ship I had would only go about nine knots at best, and she would go full speed.

Q. You think the wind was blowing about nine knots?

A. The ship was going nine knots.

Q. How fast was the wind blowing?

A. I suppose it would be blowing about 25.

Q. 25?

A. Oh, I suppose so, roughly speaking.

Q. Was there any sea?

A. A little chop.

Q. That doesn't amount to anything?

A. No.

Q. The ship didn't roll much?

A. No. You could go out in a row-boat.

Q. This was a sailing ship you were in?

A. Yes, a ship called the *Anglo-India*; a big sailing ship.

Q. No water on deck, I suppose, during those times?

A. Oh, the spray would come—strike the side and fly up.

Q. That is the only experience you have had

(Testimony of Andrew Hoben.)

there then, is it, or have you been there on other trips than the one you have just described?

A. I have been on two. I have been on the coast of Madras.

Q. Going across into the Bay of Bengal what seas would you go into there?

A. Oh, when I went to the coast of Madras it would be about some time in July.

Q. Where did you go from?

A. I went from Montevideo in ballast down to Madras.

Q. You went around the Cape of Good Hope, then, and came in that way?

A. Oh, yes, sure, run down same as going to Australia, when I got past New Zealand hauled in. The other voyage I went from Singapore to Calcutta.

Q. Now, in the month of July going across the Bay of Bengal there, did you get light breezes?

A. Sure; fine weather and light breezes. You could row a boat.

Q. What years were you down there?

A. I was down there in 1883 and I was down there in 1884, two voyages hand-running. The second time I went from Singapore to Calcutta. I sailed right up with a southwester on my beam a little till I got a little up; then of course it blew more aft. I went to Calcutta. It was September. It is fine weather.

Q. There is one question I want you to explain, Captain. When you made this survey, I notice this

(Testimony of Andrew Hoben.)

in it: "We further recommend after a major portion of the above mentioned 700,000 feet is placed on deck a further survey be held to ascertain the correct amount the vessel should carry." Now what did you mean by recommending that after a major portion was put on deck? What did you have in mind by major portion?

A. Well, we wanted to see how she was acting. We wanted the captain to pump out two of his tanks. And after that portion was on that he was getting near up to the 700,000, we would then see the ship, and if it was necessary to go ahead and put on as much as we wanted.

Q. In other words, Captain, when you spoke about the 700,000, you thought it would be wise to make a test before you got all of the 700,000 on to see how she was?

A. It is always advisable for to take precaution.

Q. I see. And that was your idea when you said that?

A. Yes, sir. We was almost certain she could carry 700,000 or more. But we wanted to be sure. We didn't want to have anything to go wrong, but we wanted him to pump out two tanks so that we could see when the ship was getting up to that quantity to see how she felt. But he wouldn't do it; he said he didn't want to; that was all he was going to carry, and that was all was in there.

Q. Did he say that to you?

(Testimony of Andrew Hoben.)

A. Yes.

Q. The captain said he didn't want to pump out any of the tanks?

A. He said he wouldn't do it.

Q. He wouldn't, and that was all the cargo he was going to carry?

A. Yes. He told that to Genereaux and myself when we were talking to him.

Q. Did you tell that to anybody else?

A. I don't know. I might have mentioned it.

Q. Did you tell that to Mr. Wheelwright?

A. No, I never seen Mr. Wheelwright to talk to him about it.

Q. Did you tell that to Mr. Wood?

A. I might have. I don't recollect. I never seen Mr. Wheelwright to make that survey, to talk to him on any business. I have seen him on the street, but I never talked to him about any business. I think we might have told Mr. Wood at the time, or we might have told Mr. Wheelwright's man that he positively refused to pump out the tanks to give us a chance. He said he didn't want to do it because he wasn't going to carry any more deck-load.

Q. He was very positive about that, wasn't he?

A. What?

Q. He was very positive he wouldn't take any more deck-load, wasn't he?

A. Yes, sure; so therefore we didn't think it was any use bothering.

(Testimony of Andrew Hoben.)

REDIRECT EXAMINATION.

Q. Captain, I am not certain that I understood you myself, but I thought you told Mr. Hayden that if you put the blocks between the stanchions and the rail it would be difficult to make them stay, or something like that. I want to go into that.

A. It might be you could nail them and make them stay, but we don't put blocks between the rail and the stanchion. I never seen it done. We put blocks down on deck.

Q. At the heel of the stanchion?

A. Yes.

Q. I want you to explain that a little. The rail of the bulwark is about six inches broad, is it not?

A. Just like this and about six inches broad.

Q. And it extends—

A. Inward.

Q. Inboard?

A. Yes, it is flush on the outside.

Q. So that the inside of the bulwark rail is about six inches nearer the longitudinal center of the ship than is the bottom of the bulwark at the deck?

A. Yes, somewhere about that; somewhere about that.

Q. So when you place a stanchion with the heel of the stanchion against the bulwark and flush with the deck, and the stanchion coming up against the

(Testimony of Andrew Hoben.)

rail, it will have an inboard tilt due to that six-inch projection of the rail, will it not?

A. Yes, too much; too much so. That is the reason the block is put in.

Q. That six inches would give you a large tumble-home or inboard lean?

A. Too much.

Q. That tumble-home or inboard lean you can reduce, and make the stanchion stand up straighter by inserting a block at the heel of the stanchion between the stanchion and the bulwark, can you not?

A. That is what it is for.

Q. And that is the usual method of blocking, is it not?

A. Sure, sure, yes, sir.

Q. Although you can, I suppose, in exceptional circumstances put a block between the stanchion and the rail itself and secure it by nailing?

A. Well, if it was necessary you could drive a block down and nail it to hold it, but excepting you would nail it you couldn't hold it between the rail and the stanchion.

Excused.

W. C. McNAUGHT, called as a witness on behalf of the libellant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Wood:

Q. Captain, will you please state your sea experience and your experience as a marine surveyor?

A. Twenty-eight years at sea; six years and a half surveyor for underwriters.

Q. When you said 28 years at sea, how much as a master?

A. About 15 years.

Q. And six and a half years as surveyor?

A. Six and a half years, yes.

Q. Here in Portland?

A. In Portland.

Q. Representing whom?

A. San Francisco Board of Underwriters.

Q. For what kind of cargoes?

A. All kinds of cargoes. Principally lumber, but all kinds—flour.

Q. Captain Hoben, I think said something about his representing them for wheat cargoes, is the reason I asked the question.

A. But some of the wheat cargoes I survey, some of the flour cargoes, some general cargoes for the Orient.

Q. What is the extent of your surveying? I would like the court to get some idea of the number

(Testimony of W. C. McNaught.)

of lumber ships including deck-loads that you survey in a year.

A. About 100 a year.

Q. About 100 a year?

A. Yes.

Q. Sailing for what ports?

A. All ports of the world.

Q. While we are on that question, Captain, do you make any difference in the amount of deck-load you let a ship carry according to what port she is sailing to?

A. I do not, unless it is winter or summer draft. That is the only difference we make in loading vessels. But if she is going to different ports or anything I don't make—don't consider what weather she might meet on the voyage.

Q. What?

A. Don't consider what weather she might meet on the voyage.

Q. The only difference you make is between winter and summer?

A. Winter and summer.

Q. And what oceans she is going to cross or what ports she is going to sail to makes no difference?

A. Not to me, as long as the ship is stable for that trade. If I considered her stable for that trade I should give her a certificate.

Q. How much difference do you make between

(Testimony of W. C. McNaught.)

winter and summer when a vessel carrying lumber is not loaded to her marks?

A. None, if she is not to her marks.

Q. I don't really know whether it has been brought out in the case what being loaded to her marks means. Will you state that?

A. Well, not all of the lumber steamers or sailing vessels load to their marks. Not all vessels carrying lumber load to their marks with lumber cargo.

Q. But what is the mark?

A. Well, that is the load draft for the ship for summer or winter.

Court: Does that mean the displacement?

Mr. Wood: No, it is the mark, is it not, on a ship's side?

A. It is, yes, sir.

Q. Placed there—

A. By the classification society.

Q. Placed there by what?

A. The classification society where the ship is classed.

Q. Indicating to what depth she may load?

A. The ship may be loaded in summer or winter months.

Q. And there is a winter mark and a summer mark, is there?

A. There is, yes.

Q. Did you make a survey of the "Saigon Maru" for this voyage to Bombay in June, 1917?

A. I did.

(Testimony of W. C. McNaught.)

Q. For whom did you make it?

A. For the charterers and owner.

Q. I didn't know whether you made it for the underwriters at all; whether they were interested.

A. At the request of the charterer and owner.

Q. Did they both request it, the charterer and the owners?

A. Generally, yes.

Q. I mean in this case.

A. I think they did. I wouldn't be sure of that point. I presume the charter party called for our survey on that ship anyhow.

Q. Were you present while the ship was loading?

A. At various times, yes. Before she started and at various times when she was loading.

Q. Did you make a survey of her before she took any cargo on at all.

A. I did.

Q. Go all through her?

A. I did; all through the cargo compartments.

Q. And while she was taking on her cargo you were present more or less of the time?

A. Yes, sir, at different times.

Q. For what purpose?

A. Well, to see how loading was progressing.

Q. Did you see any indications at any time of the vessel being tender?

A. No, sir.

Court: What ship was that?

(Testimony of W. C. McNaught.)

Mr. Wood: The "Saigon Maru"—this ship in question.

Q. Did you say you were loading for the charterer and the owner?

A. Yes, sir, it is generally at their request. The charter party generally calls for the ship to furnish a certificate by the underwriter's surveyor to the charterer.

Court: I was just getting at the fact—representation for both parties to survey the ship.

Mr. Wood: Yes, your Honor, I didn't know that myself.

Q. Are you familiar with these charters, Captain, so that you could quickly find that clause if it is here?

A. If it is there I think I could find it. Clause 62: "Vessel to furnish, prior to loading, a certificate from a marine surveyor, approved by charterers or their agents, that she is in proper condition for the voyage, and after loading a further certificate that she is properly loaded and ready for sea."

Court: Naming yourself?

Mr. Wood: No; but pursuant to that clause the charterer and owner, as I understand it, selected Captain McNaught.

Mr. Hayden: Is there any evidence that the O. S. K. employed Captain McNaught?

Mr. Wood: Not that I know of here.

Court: That is what I was trying to get at.

(Testimony of W. C. McNaught.)

Mr. Wood: There is evidence, he has just stated. Prior to that I didn't know it.

Mr. Hayden: Did you state the O. S. K. employed you to make a survey of this vessel with regard to her loading? I didn't understand what you said, Captain.

A. I am not quite sure whether they notified me. Their port captain or some of them was over there—it came through the Pacific Export Lumber Company's office—that I would make a survey on that ship, the same as I have been doing on all ships they have chartered.

Mr. Hayden: You got that from the Pacific Export Lumber Company? •

A. I presume it come through their office. We knew the ship was coming here, and she had to be surveyed; she had to furnish a certificate. I was the one that was asked to do it, and I felt that they would pay the bill.

Mr. Hayden: The Pacific Export Lumber Company?

A. They would pay the bill, but I don't know whether the ship paid the bill to them. But the Pacific Export Lumber Company would pay me. I don't know whether it would be charged up to the ship or not; didn't go into that point.

Mr. Hayden: You didn't get any pay from the ship yourself.

A. No, not from the ship; I don't think so in that

(Testimony of W. C. McNaught.)

case. I am not sure where I got my pay from, to tell you the truth.

Mr. Wood: I think this throws some light on it. Here is a letter already in evidence from Mr. Orrett, dated March 19th, with a post script, "Unless you have a marine surveyor in mind at Portland"—

Mr. Hayden: This letter I think will clear that whole thing up. I see a letter here from O. S. K. dated May 22nd: "We have arranged with the Pacific Export Lumber Company to have the ship surveyed before taking on cargo, by a marine surveyor at Portland, and they are also to arrange for the services of a marine surveyor to superintend and certify to the proper stowage of the cargo." Now whether the Pacific Export Lumber Company people arranged with Captain McNaught—

A. They arranged with me, yes. They arranged with me. They called up and told me that the ship was coming and when she would be there.

Mr. Wood: This post script states—this is March 19th, at the time the charter was made—"Unless you have a marine surveyor in mind at Portland who could survey the vessel and grant certificate, we would prefer to have the survey made up here by Captain James Fowler, representing Lloyd's register of shipping; but inasmuch as a further survey will have to be made after the vessel is loaded, it will be better, perhaps, to have both surveys made at Portland. We will be guided by your wishes in this matter." Then the Pacific Export Lumber Com-

(Testimony of W. C. McNaught.)

pany selected Captain McNaught with the acquiescence of Mr. Orrett.

Q. Captain, did the ship ever reach the stage of loading where you had to make any of these tests for tenderness that the other surveyors have testified about?

A. No, sir, but as the loading progressed, and she was loading lifting four slingloads of lumber at the time, I considered that a test was made every four slingloads of lumber that was lifted to the end of her booms and swung aboard the ship. I considered that a fair test at all times.

Court: That was only on one side?

A. On one side, yes. Well, the test would be made on one side, anyway.

Mr. Wood: Of course, your Honor, one side would be very much like the other side. The four booms that swing over the dock pick up loads of lumber and lift them, the booms being at right-angles to the length of the vessel and acting as levers. So with the weight of the slingloads of lumber at the ends of the booms, if the vessel was tender, she would tip a little that way. That is correct, is it not, Captain?

A. Very quickly show it, yes.

Court: I got the impression that the test would be made, not only from one side, but from both sides.

Q. Is there anything in that, Captain?

A. I never made them that way. I made them with the slingloads of lumber. I have also taken the

(Testimony of W. C. McNaught.)

four cargo-falls and fastened them out on the dock to the piling stringers of the dock, and doubled the winch's hold that way, to test the vessel, more than one occasion when I had doubt that she would be tender.

Q. Did this vessel have any list either way?

A. I think when she was finished loading that possibly she had about a degree of list.

Q. Would that be an appreciable list?

A. No. That would be from the coal or water, I should judge.

Q. Being practically with no list, the test made by lifting the lumber with the slings on one side would be the equivalent of making a test on the opposite side too, would it not?

A. Yes; in my opinion it would, yes, sir.

Q. Will you please state, Captain, what in your opinion would have been a minimum deck-load for this "Saigon Maru" to carry on this voyage?

A. I considered, owing to the dimensions of the ship, that she ought not to have had less than 600,000 feet of lumber—not less—and then not been near to her marks, and had plenty of stability. Possibly 700,000—I wouldn't say—but not less than 600,000 feet of lumber.

Q. You would have considered 600,000 feet of lumber a minimum deck-load?

A. Yes, sir; minimum deck-load for ship of that size and dimensions.

Q. After she had taken on that amount, you

(Testimony of W. C. McNaught.)

would consider whether she could take on up to 700,000 feet or not?

A. Yes, sir. We could make a test then, as I have explained, by putting the falls over the dock, and double the winches, if necessary, in giving her a good test. If she had plenty of stability, there is no reason why she should not load more cargo.

Q. Do you know, Captain, whether the Indian Ocean at this time of the year—June, July and August—or the China Sea, either of those seas, is any worse than numerous other parts of the ocean in the world?

A. I don't think so; nor I don't think the storms are much more frequent.

Q. In your business as a surveyor, it is your duty, is it not, to make recommendations about the amount of coal the steamer should carry on her voyage?

A. We do, yes, sir.

Q. And in this "Saiohn Maru" case, I suppose it was a part of your duty to inquire her speed and coal consumption, etc.?

A. Yes, sir.

Q. What did you consider to be a reasonable allowance of coal, allowing her sufficient margin of safety for emergencies, for this vessel to have taken on the voyage as far as Nagasaki?

A. According to the information given me by the master and the chief engineer on the vessel's speed and consumption of coal on previous voyages, I

(Testimony of W. C. McNaught.)

should consider 1000 tons sufficient coal for that voyage in the summer months.

Court: That is to carry her to Japan?

A. Safely, yes.

Court: Then they would take on other coal?

A. Yes, that was the coaling port. That was the coaling port she was going to.

Court: Do you mean Nagasaki?

A. That was the coaling port, I was told, she would go to to refill her bunkers.

Q. Oh, I forgot to ask you, Captain, about the steering rods. In your opinion is it practicable to secure these deck cargoes so they will not injure steering rods such as this type on the "Saigon Maru" was?

A. We have done so on other vessels, and they have got to their destination safely. Probably not over two months before I loaded a vessel with steering rods arranged in the same manner as the "Saigon Maru", and put a thirteen foot six deck-load on to her aft. This vessel was bound to the west coast of South America and arrived at her destination safely.

Q. And I suppose of course you gave her a certificate of seaworthiness before she left here?

A. I did.

Q. Which you would not have done unless you considered her seaworthy for the voyage. In other words, you considered the deck-load safe.

A. I think the certificate read that I considered

(Testimony of W. C. McNaught.)

the deck-load securely lashed, fit condition to go on her voyage. Evidently she must be, for she got there.

Q. I hardly think it is necessary for me to go into the method of securing these again. You heard the questions I put and Captain Hoben's answers about the method of blocking off the foot of the stanchion from the bulwarks, and so on, did you not?

A. I did.

Q. And that about correctly describes the matter, does it not?

A. It is the way we do it. According to what in-board throw you want the stanchions, that regulates the size of your block at the heel of them.

Q. By that means you can draw the deck-load a sufficient distance from the steering rods to make it perfectly safe?

A. Yes, sir.

CROSS EXAMINATION.

Questions by Mr. Hayden:

Q. Captain, you keep a record, don't you, of all the ships you survey?

A. I do, sir.

Q. Have you the record with regard to the "Sai-Maru"?

A. Yes, sir.

Q. Have you got it with you?

(Testimony of W. C. McNaught.)

A. I have got a copy of it. The original is in the office in the record book.

Q. You made the copy yourself, did you, the whole of what is in the book?

A. I didn't write it, but it is—

Q. Have you got a copy of the whole record that is in your book? Have you got that here with you?

A. No.

Mr. Wood: We will produce it.

A. No, not it all, because the record shows where the ship was built, and when she was built, and all her equipment, and everything like that, and I haven't got that with me.

Q. That is your signature, isn't it, Captain?

A. It is.

Q. That is survey of the "Saigon Maru" made by you?

A. It is.

Mr. Hayden: I will ask that this be identified.

Marked "Claimant's Identification B."

Q. You considered this ship safe to go to sea, did you, the way she was loaded?

A. I did.

Q. You considered she was in good trim?

A. I did.

Q. Trim means depth fore and aft and the arrangement of the cargo, does it not?

A. It does; freeboard, etc.

Q. Freeboard, the arrangement of the cargo, the amount she has on board, etc.

(Testimony of W. C. McNaught.)

A. Yes, sir.

Q. You were not called upon by the owners of this ship to make any statement to them as to the quantity of deck-cargo that in your opinion might have been safely carried, were you?

A. The owners of the ship?

Q. Yes.

A. No, sir.

Q. You were simply called upon, then, by the Pacific Export Lumber Company to make a statement as to what you considered to be the maximum or minimum which she might have carried on deck?

A. We are asked that, on most every ship that loads lumber that question comes up, about what they will carry, so, I presume, they will get that amount of cargo or thereabouts prepared for the ship, so there will be no delay for the ship. We are asked that question most every ship that we load, that we survey.

Q. What I was getting at was this, Captain: I want to find out whether it is fair to draw the inference that you were the agent of the Osaka Shosen Kaisha in making an estimate of what this vessel would carry, or whether you were the agent for the ones who were loading the vessel in making that estimate. As I understand it, you never got any request from the Osaka Shosen Kaisha to make any estimate of what this vessel would carry.

A. No.

(Testimony of W. C. McNaught.)

Q. But you did get that request from the charterers.

A. Asked about what she would carry; yes; not what she would carry—about what she would carry.

Q. Now, with regard to the deck-load, isn't it a fact that lumber does not put the ships down to their marks, the ordinary lumber here?

A. A great many of the vessels that load lumber here do not go to their marks.

Q. Yet they have a full deck-load of lumber and a full load of lumber under deck?

A. Yes, sir.

Q. And a good many of them do go down to their marks?

A. There are some go to their marks, yes, sir.

Q. Well, now, how do you account for the difference between them?

A. Well, the lumber is loaded at different seasons of the year. Sometimes you have much heavier lumber at different seasons of the year. Sometimes you have light lumber. And another ship may be loading that carries a big consignment of laths or pickets which were cut off the slab of the log, and are much heavier; that ship may go down to her marks. Another ship may carry more lumber and not be to her marks.

Q. Is there any reason in your mind to differentiate these ships by reason of the shape of the bottom of the ships, their fineness or anything of that kind?

(Testimony of W. C. McNaught.)

A. Well, there might be a little. I didn't call this a fine ship. I failed to see it when I was down in the hold, by any means as to call her a fine ship.

Mr. Wood: What is the last part of your answer?

A. I say, I didn't call the "Saigon Maru" a fine ship, by what I could see by going down in her hold, her cargo compartments.

Q. Would you call her a blunt ship, a full ship?

A. I would call her a medium. I wouldn't call her a full ship either—a right full ship.

Q. Not a right full ship?

A. No.

Q. Well, she was finer then than a full ship?

A. Well, that would depend on what you call a full ship, or how full your ship was. That is something you would have to explain to me.

Q. Yes, you are talking generalities pretty generally, aren't you, Captain—all of us here. But if a ship is a real fine ship she will not carry as much cargo on deck as one that is a real blunt ship, will she, or full ship?

A. That would depend. If you could put ballast enough on the fine ship, she might carry a good cargo. It would be a matter of how much ballast you could put down there to offset the cargo you were going to put on deck.

Q. The more water they have in the bottom, the more cargo she ought to have on deck if she was a fine ship?

(Testimony of W. C. McNaught.)

A. Providing she didn't go below her marks.

Q. That is a better condition to stabilize the ship, to have her tanks full of water, than it is to have them empty, for a deck load, isn't it?

A. How is that?

Q. A ship will be more stable with a deck-load with tanks full than it will if the tanks are empty?

A. Undoubtedly, yes.

Q. When you said you didn't see any indications of the vessel being tender, her tanks were full, were they not?

A. They were full, yes.

Q. Ordinarily when you seek for information as to whether or not a vessel is tender you have at least one of the tanks empty, or two of the tanks empty, do you not?

A. Well, it is customary when we load vessels here with lumber to keep some of the tanks empty.

Q. To keep them empty?

A. Some of them.

Q. So that you may, by reason of having them empty, observe whether or not they are giving as the load is put aboard? Is that it?

A. Well, as you go along loading, if your ship shows signs of tenderness, you can always run up another tank.

Q. But I say, that is the idea?

A. That is the idea.

Q. Now, this ship, however, had her tanks full when she started to load?

(Testimony of W. C. McNaught.)

A. She did.

Q. So you didn't have an opportunity to observe her as to whether or not she was tender with any of her tanks empty?

A. No, sir, because he had them full.

Q. And in addition to having her tanks full, she also had her bunkers full of coal?

A. She did.

Q. And that has a tendency to make the ship more steady, too, more stable, does it not, with her bunkers full of coal?

A. If it is not too high up.

Q. Yes. Did you ask particularly to have all four slings carry lumber aboard at one time?

A. I did, yes.

Q. On this ship?

A. On this ship.

Q. How much did she have on her deck at the time you requested that?

A. That was the day we finished loading, some few hours before they stopped loading.

Q. Some few hours before they stopped loading?

A. Yes.

Q. Where was she listed, opposite or with the lift?

A. I think she was listed to starboard, I am not sure.

Q. And then the lift was on the port side or starboard side?

A. The ship lay—I think she lay starboard side

(Testimony of W. C. McNaught.)

to the dock. Now, I wouldn't be sure. I didn't go back and keep that in mind.

Q. I was wondering whether you kept in mind the question of the way she was listed with respect to the direction of the pull of the lift.

A. Well, I have told you the list was not over a degree, if that.

Q. Well, you said it was a degree, as I understand it.

A. About a degree or less, I think I said.

Q. You said it was not—you said it was about.

A. About a degree, yes.

Q. But you don't know whether that list was away from the direction of the lift or whether it was with the direction of the lift, do you?

A. I wouldn't be sure, but I think it was the same way as the lift. I wouldn't be sure about that.

Q. Captain, were you engaged in sailing through the China Sea and the Indian Ocean during the months of July and August on these voyages that you talked about?

A. Not the Indian Ocean; not that part of it. I have crossed the Indian Ocean, but not north of the equator.

Q. The China Sea, have you been in the regular China Sea trade at all?

A. I have been in the China Sea during when I first went to sea.

(Testimony of W. C. McNaught.)

Q. That was in what kind of vessels, sailing vessels?

A. Sailing ships, yes.

Q. Never in the steamer trade there?

A. No.

Q. How many voyages did you make into the China Sea?

A. Two.

Q. What season of the year did you go?

A. One was in the winter months and one was in the summer months.

Q. You don't know the months now, do you?

A. No, I haven't got it.

Q. And this voyage, this vessel that you say went down to South America, they have no such thing in South America as the monsoons, according to your knowledge, or typhoons?

A. Not generally, no, except you call the southwest wind that blows along southern California coast in the summer time a monsoon, something like the one that blows in the Indian Ocean, brings in a long heavy swell with it.

Q. Blows four or five months, does it, on the California coast in one direction?

A. Well, generally not steady.

Q. Don't you think that the California coast winds vary during that three or four months in the summer time?

A. I believe I have just said so.

Q. They do vary?

(Testimony of W. C. McNaught.)

A. Slightly, yes.

Q. A monsoon blows from one direction, doesn't it?

A. I wouldn't say it would blow from one point steady—I don't think it will; nor a trade wind won't blow from one point steady.

Q. Will you say, Captain, it doesn't blow from one point steady, one direction generally, one point of the compass, southwesterly direction?

A. One point of the compass.

Q. And will you say a monsoon doesn't blow during the months of July and August generally, substantially all the time from the southwest direction in the Indian Ocean?

A. That is generally speaking again. I would say it may blow from the southwest, but I wouldn't say it blowed from the southwest steady.

Q. Well, what percentage would you say it varied?

A. Oh, probably two points each side of that.

Q. Well, I mean percentage of constancy in the wind.

A. I don't understand you.

Q. When I am talking about a steady wind, Captain, I mean the force of the wind from a general direction blowing constantly.

A. Blowing constantly from that point?

Q. Yes, constantly from the general direction, so as to affect the sea.

A. It generally causes a long heavy swell.

(Testimony of W. C. McNaught.)

Q. Now, is there any such thing as that on the California coast?

A. There is in the summer months, yes.

Q. A long heavy swell on the California coast in the summer month, which compares with the long heavy swell in the Indian Ocean during the months of July and August.

A. I didn't say so. I told you I hadn't been in the Indian Ocean.

Mr. Wood: North of the equator.

A. Not north of the equator. I have been south of the equator many times.

Q. Captain, you have been here some six years surveying?

A. Six years last June, sir.

Q. Were you in the lumber carrying business before you went surveying?

A. I was, sir.

Q. Have you ever heard of a vessel losing a deck-load?

A. Yes, I have heard of a vessel losing a deck-load.

Q. What vessel?

A. I don't know now.

Q. Well, how many vessels?

A. Well, it might have been—well, what do you mean, from the time I went to sea how many vessels I have heard tell of losing their deck-loads?

Q. Yes, lumber.

A. Oh, probably half a dozen vessels, or more.

(Testimony of W. C. McNaught.)

Mr. Wood: That is in over thirty years?

A. That will be in 34 or 35 years. I have heard more of them, that is had damage or lose any cargo since I come ashore than when I was going to sea. I didn't hear much of them when I was going to sea. I didn't have any myself.

Q. Practically these half dozen you have heard about have been practically in the six years you have been on shore? I will put it the other way. I don't want to put any words in your mouth. How many of them have you heard of since you have been on shore losing their deck-loads?

A. Losing complete deck-load?

Q. No, losing the forward end of it, or some part of it; just any part of it. I don't care whether it is much or little.

A. Oh, I should judge three or four vessels from here probably that has lost part of their deck-load, yes.

Q. Three or four from here?

A. I think we had two sailing vessels that lost a part.

Q. You had two sailers?

A. I think it was that.

Q. Well, have you ever heard of more than one steamer losing any of it?

A. I think there were two steamers since I have been here that have lost part of their deck-load. I think one had to go into Honolulu, a Jap steamer that had lost part of her deck-load, or had shifted

(Testimony of W. C. McNaught.)

it. I don't know which, whether she had lost it or shifted it. I think she went in there either to relash it, or stow it, or something.

Q. That is one. See if you can recollect any more.

A. No. If there was any more, it was just in a general way that we heard of it at the time, and made no record of it.

Q. You haven't any record at all, eh?

A. No.

Q. Didn't hear of the Queen Maud losing any of hers, did you?

A. The Queen Maud loaded here once or twice I think since I have been here, and she hasn't lost no deck-load. She loaded also here before I came.

Q. You say she lost no deck-load at all?

A. Not that I heard of.

Q. Oh, yes, not that you heard of. You never heard of her losing any?

A. Yes, I have loaded her.

Q. Captain, if people who, just for your information, say she lost part of it, from their own records—

Mr. Wood: When was that?

Mr. Hayden: He didn't hear of her. He said he loaded her. Let me see if I have got the date. It was on the voyage that left here along about in October, August, September, or October, 1914. Do you remember that?

A. I would be here, yes.

(Testimony of W. C. McNaught.)

Q. Is that the time that you loaded her?

A. Yes, I think so.

Q. Maybe you loaded the Ellzer about in 1907. Do you remember her?

A. No, sir, I was not here. I have only been here six years and a half.

Q. You didn't hear of her losing her deck-load either, did you?

A. It is likely I was at sea then, and didn't hear of her.

Q. You heard Captain Hoben mention a couple more vessels, whose deck-load that he recalled having lost. Did you know either of those instances?

A. No, sir. I think that would be before my time here that Captain Hoben spoke of.

Q. Now, do you think that, the way deck-loads are lashed, they will not sag out during the voyage, when the vessel has a stormy voyage, in stormy weather, so that she is rolled about very heavily?

A. There ought to be very little sag out, if the deck-load is properly lashed, unless the ship would get in a bad position and be on her beam-ends for some time. But if a ship was going along in the ordinary conditions, as a steamer or any other ship will, there ought not to be any sag to her deck-load if it is properly secured.

Q. Suppose she got into a terrific sea, like a typhoon sea, do you think that throwing her from side to side would have any effect upon the deck-load?

A. Possibly it might, or it might sink the ship

(Testimony of W. C. McNaught.)

immediately, if it was such a sea as that. Fortunately I have never seen it so bad.

Q. You went down and saw this vessel, I think you said, while she was loading?

A. Several times.

Q. Did you superintend the placing of the stanchions on the after deck to hold the cargo, I mean, the cargo stanchions?

A. I saw how they were placed.

Q. Were they satisfactory?

A. They were.

Q. And how were they placed, Captain?

A. Well, they were placed in the usual way. They stood up against the rail of the ship, with a block between the heel of the stanchion and the bulwark plating to give them enough inboard throw to keep them clear of the stanchion—to keep them clear of the iron supports that carried the steering rods along.

Q. How large was that block at the heel of the stanchion?

A. I didn't measure the block at the heel of the stanchion. I know it gave the stanchion enough inboard throw that it was satisfactory to me. I didn't measure the block at all; it was not necessary.

Q. Have you got an estimate of it?

A. No, for the reason that probably up at the bridge deck you might want a bigger block or you might not want so big a block as you would away

(Testimony of W. C. McNaught.)

aft by the poop deck, where the ship is a different shape.

Q. The object is to get the stanchions in a line, about, isn't it?

A. Try to—the lumber disposed.

Q. You say these blocks were placed where?

A. At the heel of the stanchion, being the outside.

Q. That is down on the deck, is it?

A. Down on the deck at the outside, between the heel of the stanchion and the bulwark plating.

Q. The bulwark rail?

A. The bulwark plating.

Q. Bulwark-rail plating?

Mr. Wood: No, not rail.

A. Bulwark plating.

Q. When you speak about the bulwark plating what do you mean?

A. Well, I should suppose that was the plate that formed the bulwarks of the ship.

Q. The bulwarks are the part that rise above the deck?

A. Yes, sir.

Q. A layman would say it was a fence around the deck?

A. I guess it is a fence around the deck, yes.

Q. Now, then, as I understand it, you put the block up against the plating, which would be like the boards of a fence, and the heel of the stanchion at the deck?

(Testimony of W. C. McNaught.)

A. Yes.

Q. And the effect of that block, then, would be to make the stanchion come up more straight from the deck than it would be if there was no block there?

A. Yes, sir.

Q. Now, can you—you cannot tell, as I understand you to say what the sizes of those blocks were?

A. No, sir.

Q. Were they three inches, can you estimate, say amidships; not right close to the house, but say twenty or thirty feet forward of the house, can you estimate how large those blocks were?

A. Not at this date; unless I had a thorough plan of the ship, I couldn't make no estimate now.

Q. What would be the usual size of those blocks, then?

A. Well, that would depend in a great many cases on how wide your rail was. Some ships may have four-inch—four and a half; some may have six.

Q. Let's take it on a six-inch rail.

A. After two years, I cannot tell you how much tumble-home that bulwarks had.

Q. But I am asking you now about the usual size of the block.

Mr. Wood: On what part of the ship?

Mr. Hayden: Oh, somewhere along twenty feet—thirty feet forward of the house, or aft of the house, so you get away from the—

(Testimony of W. C. McNaught.)

A. In this case it is likely we would have a smaller block aft than we had forward.

Q. Well, I am still asking you what is the usual size of the block, Captain. I want an answer to it if you can tell me what the usual size is.

A. It would probably be six to eight inches on some ships that didn't have their stanchions out at the forward end. If it was a six-inch rail, she didn't have much tumble-home, it might be six or eight inches block to keep your stanchion pretty near upright. But I presume you are talking about the aft end of the ship now where these steering rods, where their supports were, are you?

Q. Yes, that is what I am talking about.

A. I could not say just what it would be there, for I don't remember at this time how wide your rail was.

Q. But you do remember they had blocks around the foot of the stanchions?

A. That is the only way we keep the stanchion in place.

Q. Would you say, Captain, that there would be a spreading out of the deck-cargo on a long voyage, going through rough seas, of as much as three inches?

A. Well, that would depend on how the cargo was lashed.

Q. Well, I am talking about the ordinary way of lashing, the way you gentlemen do it.

A. No, sir, I should say not.

(Testimony of W. C. McNaught.)

Q. Would it be as much as two inches?

A. No, sir, I should say not.

Q. Would it be as much as one inch?

A. I should say not.

Q. Would it be as much as half an inch?

A. I should say not.

Q. It wouldn't be any then?

A. No, sir.

Q. Would it be less than it was when you started out?

A. I don't think so unless you set it—unless the lumber dried out on top and you kept setting your lashings in, you might possibly get it less, but you take stanchions, six by twelve stanchions, after you have over-all lashings on, you have them all on, set up with blocks and turnbuckles, we take a wire fall, steel fall, set them up with the winches around the stanchions, and they don't generally stretch much.

Mr. Wood: Fall means cable.

A. Cable, wire cable. Take them around the heads of the stanchions and make them tight. There isn't much chance for stretching.

Mr. Wood: Just now you referred to tightening them up with turnbuckles and blocks. That time you used the word block in the sense of pulleys, did you not?

A. Yes. Sometimes we don't have enough turnbuckles, we have to take the cargo blocks and fall, and set them up that way, and we generally clamp

(Testimony of W. C. McNaught.)

them on. In some cases they leave them—put the clamps on.

Q. Captain, I want to ask you if you are familiar with this "Know Your Own Ship," by Walton?

A. The only way I learned to know my own ship was through experience. I didn't take the book at all.

Q. What do you think of this statement of Walton's: "Even if good weather prevails, the deck-load probably sags over to one side or the other by the straining of the lashings, and each time she rolls or changes over, the deck-load jerks and sags still more." Do you think the deck-load sags at all by the rolling and jerking of the ship?

A. I didn't say it wouldn't sag, but I did say, if it was properly lashed, it would not spread out. As I understand you from spreading out, that both sides would spread out.

Q. Let us take it sag then.

A. It may possibly sag a little, yes.

Q. Would it sag as much as three inches, a high deck-load?

A. That would be according to the position of your ship. If you ever got a ship in one of these bad storms that they speak about, and she happened to get on her beam-ends, yes, it would sag three inches—probably more; if she got the wind and sea on the other side, it would go back.

Q. The best way to find out about a ship, Captain, is by, as you said, you got your experience in

(Testimony of W. C. McNaught.)

connection with shipping, your knowledge in connection with shipping, from experience; and that means from the ships that you sailed in? Is that right?

A. Yes.

Q. You, I presume, considered that you knew more about your own ship than anybody outside of it, didn't you?

A. Unless some one had sailed that ship probably before me, which in most cases they do; there is no reason why they shouldn't know as much about it.

Q. Some one who had never sailed the ship before would not be apt to know as much about the ship as the master, would they?

A. No, I don't know as he would. There might be some peculiarities he wouldn't know about.

Q. So a man who has been in a ship six or seven years would probably know more about that ship than a man who had only seen her once, wouldn't he?

A. He ought to.

Q. He would know more about her peculiarities?

A. He ought to, yes.

Q. Now, Captain, taking a ship with water ballast, and without longitudinal water-ballast bulkheads, what is the effect when the water in those tanks slackens and the ship gets into a seaway?

A. Well, it will help throw her over to the side she is listed to, or the side the sea is forcing her to.

(Testimony of W. C. McNaught.)

Q. And as the water rolls over her, it rolls with a rush, does it not, has a tendency to throw the ship in a somewhat violent manner over, does it not?

A. I don't think so; not that bad; because there is always longitudinals through the tanks, even though they have got holes cut through them. There ought to be at least three, sometimes five longitudinals through there, through your tanks, even though they ain't water-tight.

Q. What do you mean by that—three to five longitudinals?

A. Something to support your tank-tops to.

Q. You mean the tank-tops are supported by longitudinals instead of cross-sections?

A. By cross-sections and longitudinals. They have to be supported both ways. I understand this ship had a longitudinal through her, although it wasn't water-tight.

Q. I understand from the captain of this ship, the former captain of her, there was free passage for the water to go from one side to the other. One captain testified she had no longitudinals, and the other—I think both captains meant substantially the same thing—she has only got such supports coming down in those longitudinals; in other words, there are holes cut out of them.

A. There are holes cut out.

Q. The water, however, has substantially free access back and forth?

(Testimony of W. C. McNaught.)

A. Well, not so free as if there was nothing there. It acts as a wash-plate to keep the water from going over with too great a rush.

Q. Now, if a vessel is in a sea which is striking her constantly on one side, and the water in the tanks is slack, will not the tendency be for the water to gradually accumulate on the low side and put her further down?

A. It will.

Q. When the sea is constantly hitting the vessel on one side, the tendency is to heel her over to the side opposite which she is struck, is it not?

A. The water will go to the low point.

Q. That is the tendency, I say, to heel her over to the opposite side from which she is struck?

A. Yes.

Q. Now, then, when she is in that position, that is the time when the cargo sags, is it not?

A. I should judge the cargo would sag a little, then, if she went over.

Court: I would like to ask you what you mean by the sagging of the cargo.

A. Well, it may go a little in the lashings.

Court: Does that mean shifting?

A. Well, not altogether shifting. When a cargo shifts it must—I should say, if my cargo was shifting, that it was in condition then that I had to restow it. If my cargo was shifted, I would consider I had to restow my cargo then. That is what I would consider I would have to do if my cargo was shift-

(Testimony of W. C. McNaught.)

ing. But as to cargo sagging, that is very different.

Court: I don't seem to understand what you mean by sagging.

A. Well, when the vessel would be over on that angle that Mr. Hayden speaks of, the cargo might, if there was much sea, as he talks about, it might sag over by being in that position for some time.

Court: That is to say, the deck-load lashed together would.

A. It might all go a little that way, all sag a little that way; but it would not spread apart.

Q. In other words, sagging is moving bodily, the whole cargo moving bodily over to one side.

A. Yes.

Examination by Mr. Wood:

Q. I think possibly I could help a little. Captain, in a heavy seaway, when the ship is rolling, the ship herself, her own structure, is not absolutely rigid? It moves a little, doesn't it?

A. It does.

Q. Even if she has no deck-cargo at all, the structure of the ship gives a little, does it not?

A. Yes.

Q. It has to, does it not?

A. Even though she is a steel ship.

Q. Now, when this deck-cargo is loaded and lashed to the stanchions, if the vessel heels over in a heavy sea, the cargo, particularly the upper portions of it, may move a little toward the downward side—move as a whole.

(Testimony of W. C. McNaught.)

A. Move as a whole; that is it. That is sagging.

Q. What you might call an imperceptible shift; and when she comes up again or rolls over on the other side, it might move back again just a little.

A. Yes.

Q. But there is no give or break in the lashings?

A. Absolutely not.

Q. The cargo remains secure on deck, does it not?

A. Secure on deck.

Q. It is comparable to the giving or movement of the structure of the ship itself, isn't it?

A. It is.

Court: Are those deck-loads lashed to the masts?

A. We generally take lashings to the masts, what we call hog-lashings.

Court: So the cargo, then, would not sag more than the mast itself would sag?

A. The masts on a steamer, your Honor, we cannot get the lumber up to them at the bottom as it ought to be, so we cannot depend much on the lashing that goes to the mast. If there were no winches there, we could start at the bottom and build our lumber right up to the mast, and put our lashings on the mast, like we do on sailing vessels. It is very hard for a deck-load to shift or sag when it is tied to a center. But on a steamer we cannot do that. The winches are down there, and we can-

(Testimony of W. C. McNaught.)

not start our cargo next the mast at the beginning.
Cross Examination continued:

Q. Now, Captain, this sagging we have been talking about, when the ship is being constantly struck for a considerable period of time on one side, thrown one way, the sagging is a gradual process more or less, is it not? In other words, the blow or the throw gradually carries the load over?

A. Well, now, I don't quite understand you on that. You must have your ship then on her beam ends. Does she come back at all? I have always seen it come back. If they roll one way, they are bound to go the other.

Q. You don't mean to say every time your ship rolls it sags from one side to the other?

A. If you are going to have it sag this way, as much as she goes one way over she will come back the same.

Q. You think the sag of cargo is just like this every time she rolls (illustrating).

A. That is too much motion.

Q. I am trying to get at it, Captain. I am not trying to be facetious at all. I am trying to get at exactly what you mean by sag; if there is a sag, whether it stays there or whether it comes out, and if it comes out, how it comes out.

A. If there is any sag there I suppose it will come out. If you was to turn the ship around and head her right the other way, I presume the sag would go the other way.

(Testimony of W. C. McNaught.)

Q. What makes the sag come into a deck-load of lumber?

A. I presume because it would be impossible to take a deck-load of lumber and make it a rigid part of the ship. It would be impossible to do that. We do it as near as possible.

Q. You make it as rigid as you can?

A. Yes.

Q. But I ask you what makes the sag come into it. It is not rigid. Now, we have answered that. Working on that non-rigidity, what else makes the sag come into it?

A. I presume there would be this here terrible pounding that she was getting, the sea beating her on one side all the time for some time. That is one thing I can see.

Q. Well, if the sea beats her on one side all the time, and it makes a sag, as I understand it, your idea of the only way to get the sag out of her is to turn her around and run her in the opposite direction, with the sea beating her on the other side?

Mr. Wood: He didn't say that.

A. No, you didn't understand me.

Mr. Hayden: I want to get the captain's idea.

A. I said likely you could get it out that way.

Q. What other way could you get it out then?

A. Well, I have never seen the wind all the time on the one side on any one voyage I have ever made yet. I have never seen it that way all the time.

(Testimony of W. C. McNaught.)

Q. I am not talking about what you have seen. I am asking you about getting this sag out of this cargo.

A. In my opinion it is not necessary to take the sag out, if there is any. It is no harm to the ship.

Q. (Mr. Wood): As I understood his question was trying to draw out this idea, Captain, and you answered yes, that when there is a sag, the next roll back takes the sag out. Now is that your idea?

A. I don't understand it that way. I don't think one roll will give any cargo a sag. I think I have said that before—that if it was any length of time a ship was on her beam-ends, or badly over, your deck load might get a sag. I think I said that before. But I don't think just one roll of the ship, unless she went down very deep or something—

Mr. Hayden: I don't know whether it is clear to the court now what a sag is.

Court: I think I understand a sag now. I understand what the witness said about it.

Q. I read this at Mr. Huffer's suggestion, Captain.

A. Yes, sir.

Q. This is again out of Walton's "Know Your Own Ship," page 206: The vessel would eventually capsize, unless"—speaking about a sag coming into it—"unless the righting moment increases more rapidly than the capsizing moment at the successively increasing angles of heel. Among waves the danger is much greater. The rolling of the ship, together

(Testimony of W. C. McNaught.)

with blows from seas on the weather side, will naturally intensify the danger of capsizing. Often the ship is only saved from turning over by the carrying away of the lashings or jettisoning the deck load, and so relieving the ship of the top weight and inclining effect of the shifted deck cargo." Now, bearing the statement of this author, and bearing in mind he is talking about the blows from the weather side of the ship causing a sag in the lumber, I will ask you if you are trying to convey the idea, Captain, that with blows coming from the weather side this sag will decrease?

A. Decrease?

Q. With the rolling back of the ship?

A. Did you say decrease or increase?

Q. Decrease, I said.

Court: That is, would the sag go the other way? Is that what you mean?

Mr. Hayden: Sag go the other way so long as the power of the blows is against the direction which created the sag.

A. If she stayed long enough the other way, if she stayed long enough on the opposite way, if there was any sag it would certainly go back.

Q. If she stayed long enough?

A. If she stayed long enough.

Q. I am not talking about her turning around. I am talking about while she is continuing the same course, and the waves have been such as to cause a sag in the lumber, if she continues on that same

(Testimony of W. C. McNaught.)

course, will that sag come out of her, wind and waves hitting her from the same direction that caused the sag?

A. Continually? No, it won't come out of it; I wouldn't think so.

Court: I understood you to say a while ago that you thought the sag would not render the ship unseaworthy.

A. No, sir; absolutely not, providing the deck load was properly secured at the top, the sag would be so small it would not endanger the ship in any manner, if it is a well-found, seaworthy ship, or a well-handled ship. That is another thing that has got to be taken into consideration.

Q. Captain, I presume you don't question that it is the duty of the master of a ship, in making a voyage through waters where there are to be anticipated large storms, to take all those things into consideration in connection with his ship, do you?

A. I would say it was his duty to consider where he was going.

Q. Yes. And if he is going through a particularly stormy season of the year, through waters during a particularly stormy season of the year, and he has an exposed steering rod, it would be his duty to take every precaution to avoid those steering rods becoming jammed or injured, would it not?

A. It is the master's duty to care for his ship, I have always considered.

(Testimony of W. C. McNaught.)

Q. What is the effect, Captain, in a storm of the steering rod of a ship becoming jammed, say, or which would be the same thing, the rudder becoming jammed?

A. It happens at times.

Q. And what is the effect on the ship?

A. Well, if the hand gear is not connected up, if the master hasn't taken the precaution to have his hand gear ready to connect up quickly, the ship may fall off in the trough of the sea, and you will spend a very uncomfortable while.

Q. In other words, the effect then of anything happening to the rudder of the ship is for her to fall off in the trough of the sea?

A. I should judge so.

Q. And that is the most dangerous position for a ship to be in, is it not, in a storm?

A. I would think so.

Q. That is the time when the waves board the ship to a greater extent than at any other time, is it not?

A. They have the full length of the ship then to come aboard from.

Q. And furthermore the beam of the ship is exposed to the direct blow of the waves when she is in the trough of the sea?

A. Yes.

Q. So that the waves will mount her, she will not rise out of them as she would if she were headed into the waves?

(Testimony of W. C. McNaught.)

A. No.

Q. The effect of those seas, while she is in the trough of the sea is to do what with the ship? Tend to roll her over?

A. I couldn't say. Oh, I would think it might make her roll over.

Q. It would roll her over if she had too much deck load on?

A. If the ship was away too top heavy, it might roll her over. I don't know how bad the sea might happen to be.

EXAMINATION BY THE COURT.

Q. In making your estimate that this ship would carry 600,000 feet on her deck——

Mr. Wood: That was minimum.

Q. I know it was minimum. Would you make that estimate on the basis of the tanks being full?

A. I don't think it would be necessary to have all the tanks full. I think probably one of the smaller tanks might be empty.

Q. I understand you to say that the tanks were full at the time.

A. They were full, the tanks were full when I went aboard. The captain and chief officer informed me the tanks were full and would remain full.

Q. With that as a basis, do you think she could carry 600,000 feet on deck with her tanks full?

A. That would be the minimum amount she

(Testimony of W. C. McNaught.)

ought to carry according to the dimensions of the ship.

Q. With the tanks full?

A. Yes, with the tanks full.

Mr. Wood: I understood you to say, Captain, with one tank empty.

A. I thought one tank might be empty. But of course if the tanks were full she ought to carry that or probably more I said from the first.

Adjourned until 10 A. M.

Portland, Oregon, December 16, 1919. 10 A. M.

W. C. McNAUGHT—Resumes the stand.

Cross examination continued.

Q. (Mr. Hayden): Captain, did you bring with you this morning your record of this ship?

A. No, sir.

Q. Will you be good enough to let us have it, please, the original record of the ship that you made, get that for us, will you please?

A. You have a copy of it there, Mr. Hayden.

Q. I mean your own notes which you made of the ship, from which you made up this copy, this survey report.

A. I don't know as I have that. That is a note book I had two years ago. I don't know as I have that at the present time.

Q. Will you look and see if you have it, and let us know?

(Testimony of W. C. McNaught.)

A. I don't know as I have that book. If I have it, you can have it.

Q. Will you please tell me what the draft of this ship was forward when she was loaded ready for sea?

A. Forward, 22 feet 6½ inches.

Q. 22 feet 6½ inches forward?

A. Yes.

Q. And the draft aft?

A. 24 feet 1 inch.

Q. And what was the distance between her water line and the Plimsoll mark?

A. She would be about three feet from her marks.

Q. Have you got any data on that?

A. Well, her mean draft was 23 feet 3¾ inches, and her loaded draft is 25 foot 11 inches, and the difference of that.

Q. In other words, if she is down with her mean of 25 feet 11 inches then she will be down to her Plimsoll mark?

A. That is what the certificate showed, sir.

Q. Now, is that winter or summer mark, 25 feet 11?

A. That is his summer mark; salt water mark for summer.

Q. How about the winter marks?

A. The winter marks will be about 5½ inches more freeboard in the winter than in the summer time.

(Testimony of W. C. McNaught.)

Q. In other words, there would be $5\frac{1}{2}$ inches less distance in the water?

A. Less draft, yes.

Q. Less draft. Now, this draft was taken with all her tanks full?

A. It was.

Q. Now, do you think she could have loaded 600,000 feet of lumber on deck without any of her ballast tanks filled?

A. No, I wouldn't say she would. I think she would want some of her ballast filled.

Q. She would want some of her ballast tanks?

A. Yes.

Q. Can you tell me how many ballast tanks you think she would require to load this 600,000 feet on deck?

A. Oh, I would think probably five or six hundred ton in her tanks would be plenty; probably 600 ton.

Q. In her ballast tanks?

A. Yes.

Q. I understood you to say yesterday you would have put that lumber forward and aft?

A. Yes, sir.

Q. How much would you have put forward?

A. That would have been optional with the master. It would be up to him to say how much he wanted his vessel by the stern or by the head. He might want two feet of drag, and he might not

(Testimony of W. C. McNaught.)

want over six inches. The master always decides that point.

Q. Well, what would your idea be about it?

A. Well, I should say anything from around a foot to eighteen inches, I would put my vessel. That is the drag I would give her; that is what I would put her by the stern.

Q. How much lumber would that take forward then additional?

A. I don't know how much it would take.

Q. You don't know how many feet high it would raise that forward load then and the after load?

A. It would not raise it over—I do not think the deck load forward would be over probably 10 to 11 feet, I would think.

Q. And aft it would be what?

A. Oh, probably eight to nine feet, nine foot six, something like that, according to what stowage you got. It would all depend on the kind of lumber you got and how it was stowed. If it was stowed close, good lengths that butted out well on both ends, it won't go so high.

Q. Do you think if she had 10 feet or 11 feet forward she would have enough deck load forward?

A. Well, that would be determined when we would load her, Mr. Hayden.

Q. Well, do you usually load them much more than that?

A. Higher deck load than that?

Q. Yes.

(Testimony of W. C. McNaught.)

A. Yes, sir, we put it on to 14 or 15 feet.

Q. Well, would you put 14 or 15 feet on this vessel?

A. I don't know. I would have to wait and see how she was acting when I got up to 10 or 11.

Q. What did you mean when you said you would put 10 or 11 feet forward and 8 feet, 8½ or 9 aft?

A. Well, I meant that we would put it that high. That would be her deck load.

Q. And that would do what?

A. Well, it would increase her load, make her that much deeper in the water.

Q. Do you know to what extent?

A. Well, if we had the weight of the lumber and the amount to put on, you can tell how much it will submerge the ship.

Court: How much lumber would that be on the deck-load?

A. That would be probably—it takes probably between six and seven hundred thousand; probably seven hundred thousand up to that height, the deck-load, sir; that is 11 feet forward and probably 9 feet 6 aft.

Court: That would be about 700,000 feet on deck?

A. I should think so; that is, if the lumber stowed well and was good lengths.

(Testimony of W. C. McNaught.)

REDIRECT EXAMINATION.

Q. Captain McNaught, you said you thought she had about 3 feet left still to reach her Plimsoll marks?

A. About that, yes, sir.

Q. Would the additional deck-load which she should have taken put her down to her mark?

A. No, sir.

Q. It would not have put her either to her summer or winter marks, would it?

A. It would not have put her to her summer marks. It is my opinion that that vessel would not load to her summer marks with lumber, with this fir lumber.

Q. Do you think she would have loaded to her winter marks?

A. Well, I doubt it.

Q. Have you loaded other vessels for India, including Bombay, Calcutta and those ports?

A. Yes, sir.

Q. Quite a few of them?

A. I think between 15 and 20 since I have been here bound to India ports; that is Calcutta, Bombay and Karachi.

Q. Including this same season of the year that this vessel sailed?

A. At different—yes, I think some of them along this season, summer months and winter months. I

(Testimony of W. C. McNaught.)

don't know as it is the same month, but I have loaded them in summer and winter.

Q. You made no difference in the deck-load that they would carry due to their going on that voyage, did you?

A. No, sir. Except any more than I stated yesterday, the draft—the winter and summer draft.

Q. You said yesterday that this vessel you thought had about a one degree list, and your best recollection was that that was toward the dock. When these sling-loads of lumber were lifted from the dock, did that increase that list?

A. The ship did not seem to move at all when we lifted the sling-loads of lumber.

Q. Now, Captain Yamamoto in his testimony has described this southwest monsoon as a continuous wind, but not very high wind. He indicates that by 6 to 7 in the Beaufort scale, which, taking it from his own log, means strong breeze to a moderate gale, and says that that blows up a long heavy swell; and I want to know if that condition is comparable, is somewhat similar to the long heavy swell that rolls here on the Pacific through the summer months, southwest swell, I believe, on the California coast, and northwest on the Oregon coast.

A. Yes, we have a pretty heavy swell here on the Oregon coast when it blows pretty steady from the northwest for some time—a long heavy swell.

Q. It is not dangerous to ships, is it?

A. I would not think so.

(Testimony of W. C. McNaught.)

Q Did you say yesterday that a master anticipating a storm could take precaution to connect up his hand steering gear?

A He could. If he is expecting a violent storm, it would be well for him to have relieving tackles and everything ready. That is what they are there for. That is what the law compels you to carry them for, in case of emergency to have them for use.

Q When you said yesterday that in the event of the deck-load taking a sag if the ship were thrown on her beam-ends, the master could, if that sag continued, turn her around and go the opposite way. You didn't mean that that was the thing that he expected, did you?

A. No.

Q. In fact, I think you said that any sag that would occur would not interfere with the safety or navigation of the vessel, didn't you?

A. That is what I said, yes.

RECROSS EXAMINATION.

Q. Captain, do you know of any winds on the Pacific coast that blow constantly at the rate of a strong breeze or moderate gale for two or three months in the year in a certain direction?

A. No, I don't know as they blow that long. This northwest wind blows pretty steady out here for a couple of months.

Q. That is characteristic of the winds of the northwest, to blow two or three months from one

(Testimony of W. C. McNaught.)

direction at the rate of a strong breeze or moderate gale?

A. No.

Q. Do you think you are expert on the weather conditions of the Indian Ocean monsoons?

A. No, sir.

Q. You don't?

A. No, I don't claim to be expert on that. I told you I had never been—

Q. What do you allow here for fresh water, in the Columbia River, where this ship was loaded?

A. Six and a half inches, I believe, this ship.

Q. Six and a half inches?

A. Yes, sir. Just one minute—I will correct that.

Q. You are giving me the actual draft, not calculated draft, are you?

A. Calculated draft.

Q. You allow six and one-half inches?

A. I think my report will show that, my report is for fresh water.

Q. Six and a half inches you allow for fresh water?

A. The difference between fresh and salt water six and a half inches that type ship. It varies with different types of ships. I think our reports are all made at fresh water, because there is no salt water in this river, and we make allowance.

Q. What is the reason for that variation?

A. The difference in the density of the water.

(Testimony of W. C. McNaught.)

Q. Do you say in different ships in fresh water they vary?

A. The size of the ship below, the molded depth of the ship below, form of the ship in the bottom, and the size of her, the form of the ship and the size of the ship.

Q. All makes a difference as far as her displacement is concerned?

A. Yes.

Q. Now, I ask you how much allowance for fresh water on account of the difference in density—a ship draws more in fresh water than she does in salt water? That is what you mean by that?

A. Yes.

Q. So she would be really lower down apparently in the fresh water than she would be when she got to sea?

A. Yes.

Q. That would be a difference of $6\frac{1}{2}$ inches?

A. She would rise that much when she got in the salt water.

Q. You say in your report, Captain, that this ship was in fine trim, or something to that effect? "Have held final survey on above vessel. Find her cargo well stowed, deck load securely lashed; consider her in fine trim for the intended voyage."

A. I did, yes.

Q. That was your conclusion?

A. Yes, sir.

Mr. Wood: Are you going to introduce this re

(Testimony of W. C. McNaught.)

port? You have it marked for identification. If there is any question about it, I would like to have it introduced now, so I can question him about it.

Mr. Hayden: I am just asking him what I choose to ask him about his report. The reason, your Honor, I will say, I haven't introduced that report is that I don't think the statement in it, which we didn't call for, is binding on us. This is what Mr. McNaught has been testifying to. I don't care to introduce this and make it binding on us by introducing it, making it part of our evidence. So the court will not think we are trying to conceal anything. I don't want it, however, to go into the record. It may stay out of the record as far as I am concerned. It says this vessel carried a very small deck-load. That is what Captain McNaught has been testifying to. I don't care to be bound by that statement of Captain McNaught's. He was not called upon to make any such report, as far as we were concerned. Therefore I desire not to attempt to mislead the court, but state clearly the reason I am not introducing it.

REDIRECT EXAMINATION.

Q. Captain, referring to your remark on this report "Consider her in fine trim for the intended voyage," she would have been in fine trim for the intended voyage had she carried no deck-load at all, wouldn't she?

A. Yes. The reason I put that there was the

(Testimony of Henry Rothschild.)

Q. In fact, most cargoes of lumber out of these ports include deck-loads, do they not?

A. Yes, sir.

Q. And for what ports in the world have you loaded these lumber cargoes?

A. Well, Europe, Australia, South America, the Orient; practically all over the world.

Q. By Orient you include all India ports like Bombay and Calcutta?

A. Yes, sir.

Q. Did you load the Japanese steamer "Saigon Maru" here in May, 1917, on a voyage bound for Bombay, India?

A. Yes, sir.

Q. Do you recall about what that vessel carried on deck?

A. Well, roughly something about 240,000 feet.

Q. Why was a larger deck-load not carried, do you know?

A. The work was stopped by the master of the vessel.

Q. For what reasons?

A. Well, that I don't know.

Q. Well, did he give you any reasons?

A. No. We were simply the stevedores, and the work was stopped.

Q. Were you present part of the time during the loading of this cargo?

A. Yes.

(Testimony of Henry Rothschild.)

Q. Did you watch the ship as the loading progressed?

A. At various times, yes, sir.

Q. Did the vessel at any time show any indications of tenderness?

A. No, sir, not at the time we quit work.

Q. Did she at any time that you know of?

A. No, sir.

Q. How much other deck load should this vessel have carried, in your opinion, if she had taken a normal full deck load?

A. Four or five hundred thousand feet more, compared with other vessels that we have loaded.

Mr. Hayden: This, if your Honor please, is being taken all subject to the objection that we put in on that line of testimony in the fore part of the case.

Court: Very well.

Q. This "Saigon Maru" was equipped with steering rods running along the bulwark rail, was she not?

A. Yes, sir.

Q. The captain of the "Saigon Maru" has already testified in this case that one reason he refused to take more deck-load was the fear he had that the deck-load, if carried up higher than those steering rods, could not be so securely fastened that it might not shift over against those steering rods and interfere with their proper working, and so endanger his ship. I will ask you whether you have

(Testimony of Henry Rothschild.)

loaded other vessels having the same type of steering gear?

A. Yes, sir, we have.

Q. With deck-loads carried up above those steering rods?

A. Well, I couldn't say just how high that we went with them, but I believe that they were as high as the steering rods, if not higher. But I cannot recall at the present moment.

Q. Can the deck-load be secured so that there is no danger of its breaking the steering rods?

Mr. Hayden: Objected to as leading.

Court: Well, ask him his opinion about that.

Q. I will ask you, Mr. Rothschild, please to state whether or not the deck-load can be loaded and secured so as not to endanger the steering rods?

Court: That is where the deck-load goes above the steering rods.

Mr. Wood: Yes, your Honor.

A. Well, in my opinion from my experience I would say that a deck-load is secured so tightly that it would not endanger the steering rods or anything else on the deck.

Q. Could that have been done in this particular ship?

A. I would judge it could be done in this ship the same as any other vessel, whether she had steering rods or not.

Q. You are the man who actually loads these vessels. We have had some testimony on the method of

(Testimony of Henry Rothschild.)

securing these deck-loads, but I would like you to tell the court the way it is done, because, as I say, you are the man that actually does it.

A. The work is usually done under the direction and supervision of the surveyor and master of the vessel. It is done by placing stanchions secured inside of the bulwarks, and with chain lashings or wire rope lashings.

Q. And how are those drawn up and made tight?

A. Well, I couldn't say exactly. I don't supervise that work. My superintendent or the surveyor directs the work.

CROSS EXAMINATION.

Questions by Mr. Hayden:

Q. Do you know, Mr. Rothschild, what the size of the block was at the foot of the stanchion on the after-deck of the "Saigon Maru"?

A. No, sir, I do not.

Q. You didn't superintend that part of it?

A. No, sir.

Q. Or take any notice of it at all?

A. No, sir.

Q. You don't, as I understand it, personally supervise the loading of vessels?

A. No, sir, I don't.

Q. You are business manager?

A. That is all. I was present when this ship finished loading, because there was a question of whether or not we would receive more cargo or not.

(Testimony of Henry Rothschild.)

Q. Did you then note her draft aft and forward?

A. No, I did not note her draft except—

Q. You didn't see the vessel at all before she started to load the cargo then?

A. No, sir, I was not present before she started to load.

Q. Do you know whether or not it is the custom here to send vessels loaded with a deck-load of lumber, as much as they will carry, to sea without the ballast tanks being filled?

A. Well, I know that the ballast tanks are filled as to the requirements of the stability of the ship. I have known some vessels to go with a certain amount of their tanks filled, and I have known others to go without a drop of water in their ballast tanks.

Q. Now, as a stevedore you know that different kinds of lumber have different weights, don't you?

A. Well, do you refer to fir lumber?

Q. I refer to lath, railroad ties, etc. They weigh differently, don't they?

A. Well, there is a very slight difference between all classes of fir lumber.

Q. Captain McNaught has just spoken about some vessels going down to their marks, and others not, loaded with lumber. I was wondering if it was due to the difference in the weight of the lumber.

A. No, I wouldn't think so.

Q. Will a ship carry more thousand feet under

(Testimony of Henry Rothschild.)

deck if she has a lot of short stowage than she will ordinarily?

A. Would she what?

Q. Carry a greater number of thousand feet under deck with short stowage than she will if she has not?

A. Well, if the lengths are so that she requires that short stowage, why if a vessel was to have a full cargo of long lengths of lumber, and no short stowage to go with it, there would be quite a vacant space left down below decks, and she would be short on her under deck capacity.

Q. Then she would not go down to her marks under those circumstances?

A. By loading lumber?

Q. Yes.

A. And you mean her ballast tanks empty?

Q. Yes.

A. No.

Q. But if she has a great deal of short stowage, so that it is all packed in below, stowed in below closely, then she would go down to her marks, would she not?

A. Well, that I don't know. I could hardly say that. There are vessels that we have found it impossible to put to their marks, and packed them very closely with lumber.

Q. So those vessels would need their ballast tanks filled?

(Testimony of Henry Rothschild.)

A. Well, that I don't know. I wouldn't say that it was necessary to put a vessel to her marks.

Q. You haven't had much experience at sea, have you, with deck-loads of lumber?

A. No, sir, none.

Q. You have heard of some ships losing their deck-loads, haven't you?

A. Yes, sir.

Q. Do you know what voyages those ships were on?

A. I cannot recall at this moment.

Q. They have also lost deck-loads in storms, didn't they?

A. Yes, sir.

Q. They were deck-loads loaded on Puget Sound or Columbia River, or Grays Harbor?

A. Well, I should judge at all places.

Q. How many ships do you recollect having lost their deck loads, or lost part of their deck loads?

A. I cannot call to memory. I have never kept track of anything of that kind.

Q. You have heard of deck-loads shifting, haven't you, where the lumber has not been lost?

A. Yes, sir.

Q. How many ships have you heard of the deck-load shifting?

A. Very few.

Q. But there are some cases where it does happen?

A. Yes, sir.

(Testimony of Henry Rothschild.)

Q. And the deck-load shifts in storms, too, I suppose?

A. I couldn't say just where or how it shifts.

Court: In stowing the lumber under deck do you lash the lumber?

A. Under deck?

Court: Yes.

A. No, sir.

Excused.

WILLIAM D. WHEELWRIGHT resumes the stand.

DIRECT EXAMINATION CONTINUED.

Q. Mr. Wheelwright, just while we are on this subject of losing deck-loads and shifting deck-loads, that sort of testimony, in your 20 years and more of experience in shipping lumber cargoes and deck-loads, have you ever lost any?

A. We lost one deck-load in my experience, and only one that I remember. Occasionally we would lose a little, a few pieces. This one deck-load was improperly secured. It was a new type of ship, known as a turret, a longitudinal turret along the ship, and the deck-load was carried on the two sides and on top—a marine surveyor, in Puget Sound that was—lashed over with lashings from one side to the other, right over the whole thing, and in a heavy gale those lashings broke, and it all went away. After

(Testimony of Wm. D. Wheelwright—Resumed.)

that, on that type of ship, they secured the lower part even with the turrets separately by itself, put stanchions across and lashed it down, and made it practically part of the ship. Then the deck-load was piled on top just as in the case of any ordinary ship, and after that we never lost a piece.

Q. Now, at the close of your previous testimony, you were describing the contract with Gillanders, Arbuthnot & Company. Counsel objected that the cables and so on were the best evidence. I will therefore have to ask you to take your letter books and cables that you received from them, and taking them up in their chronological order, we will introduce them to show this contract. Start at the beginning and go through them.

A. This is with Gillanders only; not with Orrett.

Q. Yes, this is the contract with Gillanders for the sale of this lumber.

A. Well, the first step was our letter to Gillanders, Arbuthnot & Company.

Mr. Huffer: Before the witness begins I wish, your Honor, to object to the contract, any proof of the contract with Gillanders, Arbuthnot & Company for the sale of this lumber in Bombay, on the ground that the contract price at which it was sold in Bombay is not the proper measure of damages, and is not a fact within the contemplation of the parties at the time the contract was made. It is irrelevant and immaterial. (Objection overruled).

(Testimony of Wm. D. Wheelwright—Resumed.)

A. The negotiations leading up to this sale began with a letter from us to Gillanders, Arbuthnot & Company, dated the 14th of December and inclosing a copy of the schedule for 45 hundred thousand feet which we had received from Bombay at the hands of our traveling representative, who went over there and obtained it from them.

Q. Is that the letter there, Mr. Wheelwright?

A. This is the letter in letterbook No. 11, page 228 and so on.

Mr. Wood: I will show it to counsel and then read it.

A. Do you want to read it all? The only point in it—the main point in it is that it contains the schedule that this cargo was based on.

Mr. Hayden: You will read it out loud?

Mr. Wood: Yes, unless you are willing to waive the reading of it. Mr. Wheelwright says parts of it are immaterial. I don't suppose I need offer these books in evidence, your Honor. Of course, these are their office books. I don't want to leave them here. It will be satisfactory to everybody if I read from the copy books?

Mr. Huffer: Oh, yes.

Court: You don't want to leave the books, do you?

Mr. Wood: No, I don't, not if I can avoid it.

Mr. Huffer: We object to the introduction of the letter on the grounds stated.

Court: The objection will be overruled.

(Testimony of Wm. D. Wheelwright—Resumed.)

Mr. Wood: I will read a portion of it. It is dated December 14, 1916. To Messrs. Gillanders, Arbuthnot & Co., Bombay, India. "We have to thank you for your offer received through Mr. Payne on the 6th inst. of 250 shillings per thousand feet on the basis of 'G' list for a cargo of three million feet of lumber, half squares 24 feet and up, for January shipment, which was finally merged into an offer of the same price for the same shipment for a cargo of 4,500,000 feet, to be furnished in accordance with the schedule inclosed herein called 'Adneci,' discharge to be at rate of 300,000 per working day." And the schedule "Adneci" is attached to that letter. It is the same schedule as has already been introduced in evidence.

A. The next step was taken by means of our cable to them of March 3rd, after negotiating, correspondence covering that period, and the translation reads—

Same objection.

Mr. Wood: It is understood these objections are all made.

A. (Continuing) "We think there is good prospect 7500 loads of 50 cubic feet, 180 shillings per load basis Cif per steamer Bombay March-April-May shipment. Price is exclusive of war risk always. Must have a confirmed banker's credit London, including freight.

Mr. Hayden: How many loads did that read?

Mr. Wood: 7500.

(Testimony of Wm. D. Wheelwright—Resumed.)

Mr. Hayden: And how much a load?

A. 600 feet. That would be about four and a half million. In reply to that a cable from Gillanders from Calcutta, received on the 10th of March; and I will say that we negotiated with the Calcutta office, because that was the head office. At Bombay they only had a branch. "We give you firm offer as per your telegram of March 3, 7500 loads of 50 cubic feet. We would prefer smaller quantity. 180 shillings per load including war risk. We cannot pay more." The code word is "We cannot pay more than." We understood it to mean "We cannot pay more."

Mr. Huffer: What was the date of that?

A. We never knew the date. It was received here on the afternoon of the 9th of March. I said the 10th—that is a mistake—the 9th of March.

Mr. Hayden: Did you say, exclusive of war risk, 180 shillings a load?

A. Yes. Well, no, they said "Including war risk." Ours said exclusive, but they insisted on inclusive.

Q. How much was you offer in that telegram of March 3rd?

A. 180.

Q. Yours excluded war risk?

A. Exclusive; and theirs was including war risk. That was the price at which it was finally closed. Well, now in here came negotiations with Mr. Orrett.

(Testimony of Wm. D. Wheelwright—Resumed.)

Q. Leave that out for the present. Just follow with Gillanders.

A. On the 7th of March we wrote them "Our last letter was dated the 3rd, since which time we have heard of no new transactions in lumber for India, but we have telegram today from the Osaka Shosen Kaisha of Tacoma saying that his company would be disposed to put on steamer for Bombay if we could make them offer at reasonable rate, in reply to which we are telegraphing him that we will make offers of lumber to Bombay or Calcutta on the basis of any reasonable rate that he will name. We fear, however, that he would give preference to his Japanese friends." That is all in that letter on this subject.

Mr. Wood: Do you wish to see any of these letters, Mr. Huffer?

Mr. Huffer: No, I don't care to see them.

Mr. Hayden: What book and page is that letter?

A. That is book No. 12, page 285. The next letter is page 296, dated March 10th. Shall I read the whole? There is a great deal here that does not bear on the subject.

Q. No, I think if counsel is willing—all these letters are subject to your inspection.

A. (Reading) "We took up the question of the freight at once with Mr. Orrett, who seemed to be very anxious for Indian business; also desirous of competing with the Japanese merchants and wanting specially to deal with us exclusively. He said

(Testimony of Wm. D. Wheelwright—Resumed.)

over the telephone yesterday afternoon that he had said nothing to any of the Puget Sound shippers, and he would refrain from doing so, relying on us to tell him the situation, advising him as to what had been done and what could be done. This we have done to the best of our ability, and telegraphed him a firm offer for suitable steamer ready to begin loading here in April as early as possible, subject to reply here on Monday. We thank you heartily for this offer and shall leave no stone unturned to accept it. This afternoon we have word from Mr. Orrett by telephone that he is cabling our offer subject to reply on Monday."

Then on the 12th of March, same letter book, page 305, we telegraphed Gillanders at Calcutta: "Working. Understand 180 per load basis offer to stand good until advised to the contrary. Telegraph if not in order."

Q. What does that word "working" mean?

A. Why, we are working on the business, and the basis means basis of G list as explained in previous testimony.

Mr. Hayden: 180 means shillings?

A. Yes, 180 shillings.

Mr. Hayden: And the load means what?

A. 50 cubic feet, 180 shillings per load. Haven't any cables from them here? I thought we had cable.

Q. No, I have no cables from Gillanders.

A. Well, then the cable that I read was dated

(Testimony of Wm. D. Wheelwright—Resumed.)

March 12th. On the 13th we cabled them, this is page 314: "Think can accept subject your approving charter 'Saigon Maru,' estimated 3,300,000, Osaka Shosen Kaisha represent making April-May clearance; freight prepaid; option substitute another at least equally near loading port, not exceeding four and a half millions. Confirm quickly."

Mr. Huffer: That is to you, was it?

A. No, that is ours to them.

Mr. Hayden: You haven't got any typewritten copies of those letters, have you?

A. I will have them made from this book.

Mr. Wood: I have one here. It is the only one we have.

Q. Mr. Wheelwright, did you read there the cable from them of March 9th: "We give you firm offer as to your telegram of March 3, 7500 loads of 50 cubic feet?"

Mr. Hayden: I think you read one of March 7th. There is one of March 9th, "Prefer smaller quantity, 180 shillings per load including war risk."

Court: Before you get away from that telegram does that mean that you are contracting for one cargo 4,500,000 feet?

A. No, your Honor. This is March 13th, page 314: "Think can accept subject your approving charter 'Saigon Maru' estimated 3300 thousand. Osaka Shosen Kaisha represent making April-May clearance, freight prepaid. Option substitute another at least equally near loading port not exceeding

(Testimony of Wm. D. Wheelwright—Resumed.)

four half million. Confirm quickly." In reply to that we received this cable.

Mr. Hayden: I can't quite hear you.

A. I will talk a little louder. In reply to that we received the following cable from Calcutta on the 17th of March, in which they say as follows: "As per your telegram of 14th day of March"—that means our cable of the 13th, because they are not received in Calcutta until the next day. There is nothing on them to denote the date when they were sent, and in all of our correspondence they are invariably referred to as the cable of the date that they were received: "As per your telegram of 14th March we confirm the offer to stand good until advised to the contrary. Do your utmost to make maximum quantity 6000 loads of 50 cubic feet," which will be 3,600,000 feet. Then we received on the same date further answer to our telegram reading as follows, Bentley's code, signifying the code in which it was sent: "Referring to your telegram of 14th we cannot consider terms of charter. Our offer is Cif including war risk, payment by three months' sight draft on London. Freight to be included. On this understanding we agree to 5500 tons 3300 thousand feet, but we cannot agree option of another steamer unless similar quantity. We prefer some delay in shipment rather than larger quantity." We spoke of 3300 thousand with Orrett to substitute another steamer up to 4,500,000, and that they did not favor.

Mr. Huffer: You just stated they did not favor.

(Testimony of Wm. D. Wheelwright—Resumed.)

All you know about that is what is shown by this correspondence you are reading, about what they did or did not favor.

A. Yes, that is all. They said they wouldn't do that.

Q. I think the next is our cable of March 17th to them.

A. I was looking at the one between.

Q. Is there one between?

A. Well, that doesn't have any bearing on it, just discussing the thing generally. There is one on page 328 and one on page 334 that don't touch the matter. Now on the 17th we cabled them answering their cable of that day, or the cable received on that day: "Your telegram to hand. We conform to contents. Expect close 'Saigon Maru' estimated 5500 loads of 50 cubic feet." I wish to explain that the use of the word "Your telegram to hand. We conform to contents," means we accept your offer, when the telegram acknowledged contains an offer, and that form is used, because the code we use has one word meaning "Your telegram at hand. We conform to contents;" whereas if we wanted to say "We received your telegram and accept your offer," it would take two words. But "Your telegram received. We conform to contents," is our way of accepting an offer when the telegram acknowledged contains an offer.

Court: How many thousand feet does that carry?

(Testimony of Wm. D. Wheelwright—Resumed.)

A. Well, that would be 3,300,000 feet, according to our telegram, with right to substitute another steamer provided she was of about the same capacity, as they stipulated, and also we were to have more time in which to ship rather than to ship a larger quantity.

Mr. Wood: The court might have in mind the number of loads in that last telegram, 5500 loads of 50 cubic feet.

Court: That would be how many feet?

A. 3,300,000.

Court: That was the conclusion?

A. That was the contract finally. Book 12 that was folio 353. That telegram was sent at 5:20 P. M. on the 17th of March.

Q. And all of these cables are based on the Adneci schedule which you had furnished them in the beginning, were they not?

A. Yes.

Mr. Huffer: We object to the witness testifying to any other thing than is shown by the correspondence.

A. Well, the correspondence did show that. It said that all negotiations would be on the basis of Adneci.

Mr. Wood: I don't think there is any use putting these in. They are not intelligible. Do you want to read them?

Mr. Huffer: I would like to have all the copies

(Testimony of Wm. D. Wheelwright—Resumed.)
of these, everything go into the record, all cables and letters.

Court: Do you want all these cables in the record?

Mr. Wood: They are all in code, your Honor.

Court: Well, the translation has been read into the record.

Mr. Wood: Yes, your Honor.

Mr. Huffer: What I want is parts of the letters that have been read and part not read.

Mr. Hayden: I was just going to suggest that we better have the books and we may look at the letters that haven't been read and have been read.

Mr. Wood: You may have them.

A. Yes.

Q. I will now, Mr. Wheelwright, ask you to take up the correspondence with Mr. Orrett that went along simultaneously with this with Gillanders, Arbuthnot & Co., and I think the first is letter book 12, page 272.

Court: Are those letters in evidence, Mr. Wood?

Mr. Wood: No, your Honor. Some are but some are not. The telegram from Mr. Orrett is already in evidence, dated March 7, 1917, and it is Libelant's Exhibit A. The telegram from Mr. Orrett to Mr. Wheelwright reads "Have you any inquiries or do you know of any offers for lumber Bombay subject to proper inducements we might put boat on berth May loading." I want you to give the answer to that, please.

(Testimony of Wm. D. Wheelwright—Resumed.)

A. I answered that on March 7th, page 272 letter book 12: "Answering your telegram of this afternoon about Bombay, we have to say that we have urgent inquiries from that port, as also from Calcutta, on which we shall be glad to make firm proposals on the basis of any reasonable rate of freight that you will name us. Trusting that you will be able to do so, we remain." And on the same day—there are two telegrams here about something else. I won't put that in. It is some other business, another shipment to another point. On the 9th of March I wrote him.

Q. Just a moment, Mr. Wheelwright, I think that letter is already in. Is that the letter beginning, "Referring to your telegram of the 7th about Bombay"?

A. Yes.

Q. That letter is already in, and is marked "Libelant's Exhibit B." So you may skip that. That is the letter which had the "Adneci" schedule attached.

A. Then on the morning of the next day we telegraphed Mr. Orrett at 10 o'clock as follows: "Rates mentioned in yesterday's letter subject to five per cent including,"—I don't understand.

Q. That is not the telegram I have here.

A. I don't think you have this, only I was going through it all. This was, I might say, negotiating. I don't know whether I need go into it.

Mr. Hayden: Is that the telegram of the 10th you are trying to read?

(Testimony of Wm. D. Wheelwright—Resumed.)

A. Yes. There is a word "including," I think it is simply a clerical error for "included," "subject to 5% included," we will say.

Q. Yes, that is the one I want. It has something in it not relating to this business and something relating to it.

A. I might suggest the whole thing is contained in a letter confirming the telegram, and I will read that: "We hereby confirm and explain our letter of yesterday and telegram of this morning, as per copy herein, 'we offer firm 240 shillings per thousand feet, less 5% charter commission for steamer of not exceed four and a half million feet capacity to load at not more than two points on the Columbia—Willamette Rivers, laydays April 13 or thereabouts, freight payable at port of discharge, 300,000 feet per working day for loading and the same for discharge, demurrage at a fair rate, and dispatch money to be allowed at three-fourths of that rate, the cargo to be cut in accordance with the schedule called 'Adneci' which was inclosed in our letter of yesterday, 10% of same to be stowage lengths and to go at half rate, charterer stevedore to load at current rates. Should you come back with an offer for later loading, we shall be in a position to accept same provided the steamer is berthed here during the month of May, but might have to cable about it, especially if any doubt existed. Should you make us an offer at any higher rate, or should you have to stipulate for Puget Sound loading, we shall be

(Testimony of Wm. D. Wheelwright—Resumed.)

glad to cable our Bombay friends on the subject. At present writing we cannot make the above offer good except for reply within the time stated."

Q. That is the letter of March 10th, is it?

A. Letter of March 10th, folio 295 of the 13th of March. Isn't there something here from Mr. Orrett in evidence? I cannot read it without seeing what he wrote.

Q. Yes, telegram from him. I will read it aloud. March 13th; Libelant's Exhibit C. "Pacific Export Lumber Co., Portland, Or.: Have received cable from Osaka today begin Bombay lumber April May loading will take full load for Saigon freight rate two hundred forty shillings less five percent loading per day three hundred thousand feet or more discharging laydays ten days demurrage two thousand dollars per day cancelling date June fifteenth will take on deck as much as possible lessen long stuff as much as possible delivery fas both ends freight to be prepared your reply end please advise further Edwin Orrett." What did you answer to that?

A. To that we answered, page 313, date March 13th: "Saigon Maru. Columbia-Willamette River loading. We require layday conditions as follows: 300,000 feet or more working day loading. Same discharging. Dispatch money at one-third of demurrage. 10 per cent stowage lengths at half rate. Give steamer's last known location and prospective voyages toward Columbia River; also date when lay-

(Testimony of Wm. D. Wheelwright—Resumed.)

days begin. Please cable accordingly. We are cabling Bombay so as to be in position to close on receipt of your reply."

Q. I think the next one is 318.

A. There is one in between. It has no bearing; and on that day we wrote: "We have your telegram of today, and enclose copies of our two messages of this date to you; hoping that you and we may both receive cables tomorrow from Japan and Bombay respectively, that will enable us to close this matter up; so we hand you herewith a form of charter party into which should be filled, on lines 4 and 5, the location and the prospective voyage of the steamer, and on lines 83 and 84 the cancelling date and the date when laydays are to begin."

On the 15th of March we wired Mr. Orrett—it must have been in answer to something from him: "Agreeable to your request, we waive condition re extra insurance on deck. Still awaiting reply from Bombay." That was folio 336.

Now, the next is our telegram of March 17th, folio 350: "Edwin Orrett. We accept Saigon on terms of charter party mailed 13th. Erasing condition about deck load insurance, you filling in date before which laydays cannot begin and cancelling date. The only difference between your terms and ours, as we understand it, is that owners allow ten days for discharging at Bombay, while our condition is 300,000 feet per working day. You

(Testimony of Wm. D. Wheelwright—Resumed.)

need not mention dispatch money in cable or cancelling date beyond saying seems late; prefer earlier. Get steamer's location and prospective voyage, with date for laydays."

Q. What was the hour of that?

A. That was sent at 10 o'clock in the morning of March 17th.

Q. And closed everything except the conditions about laydays for discharging?

A. Well, it didn't close anything.

Q. I mean, that was still left open?

A. It agreed to it. We agreed to take the ship subject to certain reconciliation of certain differences in terms and conditions, and evidently expecting him to cable to Osaka and get an answer.

Q. And those differences related principally to the discharge laydays?

A. They related principally to loading and discharging. They wanted ten days. We objected to that, because we thought she would carry 3,500,000, and that was too much, 350,000 a day, so we hung out for 300,000 a day. They didn't want to give that. They preferred the ten days, because evidently they expected her to carry this 3,300,000 to 3,500,000, as we did. Now, there must be something in between. It was on that day, the 17th, that, feeling we were very near doing this and hoping to do it, we took the risk and closed the deal with Gillanders.

Q. That has already appeared from the cables?

A. Yes; but not in connection with this. It was

(Testimony of Wm. D. Wheelwright—Resumed.)

sent on the same day, 5:30 P. M., we closed the business with Gillanders. Then on the 20th is our letter of that date, March 20th, folio 366.

Q. That is already in evidence. You mean, "Your full and interesting letter of yesterday"?

A. Yes. It closes the whole matter up and sends the charter party.

Q. That is Libelant's Exhibit "F."

A. That is three days later than the date on which we sold the cargo.

Q. I see from the charter party, lines 53 to 55, which say "Discharge to be given with dispatch according to the custom of the port of discharge at such safe wharf, dock or place as charterers or their agents shall designate, at the rate of three hundred thousand feet BM per working day, counting from time of steamer being in berth as ordered and ready to discharge cargo," from which I assume that they yielded to your contention about the discharge?

A. They waived that, yes.

Q. Mr. Wheelwright, when you were on the stand before, some testimony was given by you to the effect that you sold this cargo on the basis of "G" list, and it didn't make any difference to your end of it whether the long lengths were left behind, because the more you got for those long lengths the more you had to pay for them, and so on. Do you recall that testimony?

A. Perfectly.

(Testimony of Wm. D. Wheelwright—Resumed.)

Q. I would like you to explain that a little more fully, especially with reference to the claim of Gillanders, Arbuthnot & Co. against you for damages on account of the failure to deliver long lengths?

A. Well, I said that it made no difference to us.

Mr. Huffer: We object to any testimony bearing upon any collateral contract that the Pacific Export Lumber Company claims to have made with Gillanders, Arbuthnot & Co.

Objection overruled.

A. I stated that it made no difference to us, because whatever disadvantage we suffered by not being able to deliver the long lengths and get the price therefor, that was made up to us by our getting shorter lengths at a lower price. But that is apart from the question of the specific value of the long lengths to anybody who bought them.

Court: I understood you to say your profit would be the same?

A. It would make no difference to us. But it does not follow from that it might not make a great difference to the buyer, because he might, frequently does, sell the long lengths at a much greater difference than the "G" list difference. At the present time in this port, if you want to buy a carload or any portion of clear lumber, you not only have to pay the differential according to the list, but you have to pay \$20 more, according to the great scarcity of clear. So long lengths are worth really a great deal more than the differential. But it made no

(Testimony of Wm. D. Wheelwright—Resumed.)

difference to us in this case. That is all I meant to say.

Q. Except that it make a difference to you in this way, does it not? It makes a difference in the claim for damages that Gillanders, Arbuthnot & Co. are making against you?

A. It proves to make a difference, because they have valued the long lengths at more than the differential.

Mr. Huffer: It will be understood, your Honor, in order that our position may be made clear once for all, we object, and are objecting throughout, to any proof of any claim for damages for loss that Gillanders, Arbuthnot & Co. may have had, or may have against the Pacific Export Lumber Company, for the reason that is a collateral contract, of which we had no knowledge at the time of entering into the charter party; and also on the ground, your Honor, that there is no showing that any part of this claim has been paid by the Pacific Export Lumber Company. It accrued, if it accrued at all, two years and a half ago, and there is no showing that the claim has been paid; and the proper measure of damages, so far as the Pacific Export Lumber Company is concerned, is, as we have stated before more than once, the difference in the market prices between Portland and Bombay on the second day of August, 1917, the day that the contract was breached, and not any special contracts of sale—not the contract of sale to Gillanders, Arbuthnot &

(Testimony of Wm. D. Wheelwright—Resumed.)

Co., or any claim for damages that Gillanders, Arbuthnot & Co. may have against the Pacific Export Lumber Company. Our contention is that the market price at Portland must be taken as of August 2nd, 1917, to which is added the cost of transporting the lumber to Bombay, and against that the market price of lumber at Bombay on the same date.

Court: That would be on the volume of lumber that you failed to carry?

Mr. Huffer: Yes, your Honor. And it will result inevitably in awarding double damages on the contract of Pacific Export Lumber Company with Gillanders, Arbuthnot & Co.

Court: I understand your position, and I am allowing the testimony to go in.

Mr. Huffer: We have never had any opportunity to have any hearing on the question of the claim of Gillanders, Arbuthnot & Co., and we ought not to be bound by this pleasing concord of the Pacific Export Lumber Company with Gillanders, Arbuthnot & Co. that the latter has a claim against the former, especially in view of the fact that it doesn't appear that a cent has ever been paid for it.

Court: I will allow the testimony to go in, so the court will have the matter all before it.

Mr. Huffer: There is no privity between us and Gillanders, Arbuthnot & Co.

Court: I understand that. The court will hear you on your different theories of this matter of damages when the case is heard on the argument.

(Testimony of Wm. D. Wheelwright—Resumed.)

Mr. Huffer: So it is understood that our objection goes to the entire line of any testimony on this collateral claim of Gillanders, Arbuthnot & Co.

Court: Very well; you may have your objection.

Mr. Huffer: We want an exception, of course.

Q. Mr. Wheelwright, in the depositions taken in Bombay by the representatives of Gillanders, Arbuthnot & Co. it is stated that Gillanders, Arbuthnot & Co. suffered a loss to the extent of 1075 pounds on account of short delivery of the cargo, and a further claim of about 4550 rupees on account of the failure to deliver the long lengths, and that shows that they are holding you liable for that; and I would like to ask whether the Pacific Export Lumber Company acknowledges that liability.

Mr. Huffer: Another objection I want to urge so far as this item of extra long lengths is concerned, the amount of such long lengths and the specifications of them are too indefinite and uncertain to be relied upon as a measure of damages. No proof—no definite proof of any kind.

Objection overruled. Exception allowed.

A. We do acknowledge that liability.

Q. Have you paid the money?

A. We haven't paid the money, because in such cases as that, where we have to pay damages for nonperformance, particularly where we were not at fault, as we felt, although liable, there is always a large range given. We sometimes settle a thing of that kind by saying we will pay it when they give

(Testimony of Wm. D. Wheelwright—Resumed.)

us another order. I saw the people in Calcutta, told them we would settle this claim, asked them to hold off.

Mr. Huffer: We object to the witness' testifying about anything that is necessarily shown by correspondence. Any correspondence between the parties with reference to this claim of Gillanders, Arbuthnot & Co. against them would be the only competent testimony, in view of the fact that it was necessarily by correspondence.

Mr. Wood: It was not necessarily by correspondence.

Court: You are inquiring now about that claim between Mr. Wheelwright and these purchasers in Bombay. If he had a talk with these men, I think that would be admissible on the theory that Mr. Wood is trying the case; act upon either theory as the court might think is the proper one.

A. I only said to them that we would settle the claim.

Court: What was the basis, Mr. Wheelwright, upon which Gillanders, Arbuthnot & Co. made their claim against you?

A. In the first place, that they didn't get as much lumber as they bought. That was the main thing. They bought 3,300,000, and they got 2,700,000, or something like that.

Court: Well, now then, what was the rate?

A. Well, the market had gone up there, so that

(Testimony of Wm. D. Wheelwright—Resumed.)

by the time it arrived it was worth a great deal more than our contract price.

Court: And they made that claim?

A. And that was their difference. I don't know whether they actually went out and bought it or not; I cannot say; but the figures they made were reasonable, I knew myself, owing to the advance in the market. That was the main claim. This matter of claim on account of the long lengths, I could not judge of. It was not very large.

Court: Have you got the stated claim?

Mr. Wood: Yes, in the form of these depositions.

Court: Those you have knowledge of?

Mr. Huffer: We have knowledge of the depositions, your Honor. But what I am insisting on is this: Proof of this claim being made, which must be by some sort of correspondence, should be produced.

Court: Well, if they arrived at the just amount between themselves, whether by correspondence or orally, it doesn't seem to the court it would make any difference upon Mr. Wood's theory. I will allow the evidence to go in.

Mr. Huffer: Exception; incompetency of the testimony also.

Q. Mr. Wheelwright, the court a moment ago said that he would like to have the record complete on this measure of damages, so that he could use any measure he wished. I would therefore like to get into the record the evidence which Mr. Huffer

(Testimony of Wm. D. Wheelwright—Resumed.)

is apparently seeking on the market value of the lumber here in June, 1917.

A. Well, that is very hard for me to say. This contract was made in March, and my recollection is that there was a very large advance in lumber both here and abroad in August, and I think in June. I can look at our books and see what we paid and after the recess tell you. I cannot say off-hand what the market price was.

Court: You say the true measure of damages is the difference in August?

Mr. Huffer: In August, yes.

Court: Do you know the price of lumber here in August and the price of lumber in Bombay?

A. I cannot tell what it was in Bombay, except as it comes out in this case; but I can tell what it was here on the second of August.

Q. Mr. Huffer asked you to produce the invoice for this cargo that you received from Inman-Paulsen Lumber Company.

A. Yes, I handed it to him.

Mr. Wood: You have it, Mr. Huffer?

Mr. Huffer: Yes, I have it. I wanted it for the purpose of verifying it. I didn't want to introduce it.

Mr. Wood: I think your Honor would like to have it in. Would you like to have this record completed by having in the bill from the Lumber Company for this lumber?

(Testimony of Wm. D. Wheelwright—Resumed.)

Court: Yes, it might be that way, but these bills are dated earlier than August 2nd.

Mr. Wood: Yes, they are, your Honor.

Court: Those bills may as well go in.

Q. These two sheets the first of which is dated June 4, 1917, are the bill from Inman-Poulsen, are they?

A. This one you handed me is a copy of our invoice to Gillanders, Arbuthnot & Co. June 4th.

Mr. Wood: I will introduce that.

Objected to on the ground it is incompetent, irrelevant and immaterial and not the proper measure of damages, not the proper basis for the measure of damages, on the ground that it is the sale price. Is it not the sale price?

A. Yes, the price at which we sold them that lumber.

Objection overruled.

Marked "Plaintiff's Exhibit O."

Q. What is this paper?

A. This paper is invoice of Inman-Poulsen Lumber Company to us of that cargo, showing what we paid for it free alongside vessel in Portland.

Mr. Wood: I offer that.

Mr. Huffer: Before I make my objection, when did you make that contract with the Lumber Company for that lumber?

A. In March when we sold it.

Mr. Huffer: Objected to on the ground, in ad-

(Testimony of Wm. D. Wheelwright—Resumed.)

dition to other grounds stated, it is not the time as of which the damage would be calculated.

Objection overruled. Exception allowed.

Mr. Wood: Just so that I may understand you, Mr. Huffer, you claim this whole measure of damages should take place on August 2nd?

Mr. Huffer: Yes.

Marked "Libelant's Exhibit P."

Recess taken until 2 P. M.

Q. During the noon recess did you ascertain the market value of lumber here on or about August 2, 1917?

A. Well, as far as I could. The time was very short. I had not time to consult anyone, and I could only go by our own records. I find on the 26th of July we bought two and a half million feet of lumber at \$21 right through for sizes that were worth \$4.50 over G list, which would make the price, according to G list, that I paid \$16.50 net, as compared with \$11.50 less 2½ per cent twice, which is \$10.93, showing a difference of \$5.57 advance. Then I find on this same order that on the 17th of August the people wanted to buy some more, and the market had gone up, and we had to pay \$1.50 more to get it. The market price was advancing from the time that ship was loaded right up, and has been advancing ever since.

Q. That lumber was similar, in a general way, to the cargo shipped on the "Saigon Maru"?

(Testimony of Wm. D. Wheelwright—Resumed.)

A. Well, no, it was quite different. It consisted all of squares. But on the basis of the list I am speaking, makes it the same.

Q. It would be a fair comparison?

A. Yes, \$5.57 more. That is out of our records. I could make inquiry tomorrow from various people and find out here what the list price was the second of August, but I could not reach it this noon.

Q. On the 26th of July it was \$5.57 increase over what you paid for the "Saigon's" cargo?

A. Yes.

Q. How were charter rates changing in the meantime, between the time you chartered this vessel and the second of August?

Mr. Hayden: I think that is immaterial. Objected to because the measure of damages is the actual amount it would cost to have transported the lumber to Bombay, and if it had been transported it would have been transported on this vessel, and that rate is fixed in the charter party.

Objection overruled. Exception allowed.

A. Well, charter rates were higher.

Court: You don't know what they were?

A. I cannot say exactly. My recollection is about \$4.

Mr. Huffer: We object to the witness testifying unless he is advised.

A. According to my best recollection.

Q. What do you mean by \$4?

A. \$4 a thousand feet.

(Testimony of Wm. D. Wheelwright—Resumed.)

Q. Increase?

A. Yes.

Mr. Huffer: Since what time?

A. Well, after March up to—up to July.

Court: And what was the corresponding rate of rise in lumber in Bombay?

A. I have no knowledge of that, only what is in the record here, and I have not looked at that lately, and I do not remember.

Mr. Wood: Those depositions have not been read yet. They state the market value of the lumber in Bombay on the 2nd of August.

A. If we had tried to ship that lumber when this vessel left it behind—the first thing we did was to see if we couldn't get it forwarded; we found it impossible to get it forwarded at all.

Court: You could not get any ships?

A. No. Well, you see it was only 500,000, and you never could get a ship of that size to go to Bombay. There were no lines running to Bombay and Calcutta. The only way to ship was from Seattle to Hong Kong. That would have involved shipping the lumber over there at a cost of \$4 or \$5 a thousand.

Q. Extra?

A. Extra. No, at a cost of \$4 to \$5 a thousand for the rail journey to Seattle. Then \$25 was the rate to Hong Kong, which would have made \$30. Then from Hong Kong to Bombay or Calcutta, the lines there had taken out their lumber rates; they

(Testimony of Wm. D. Wheelwright—Resumed.)

would not take any lumber at rates per thousand feet. They were crowded with general cargo, and they would take lumber only in limited quantities at a rate corresponding to the rate per ton. That was \$25 for 40 cubic feet, or 480, which figured out \$61 a thousand for lumber; making altogether a cost of getting there of \$90 a thousand against about \$57, we will say, for this boat. But then we could not ship it because the lines would not take anything over 20 feet long, and the bulk of the lumber that they left behind was of long lengths.

Court: That puts the company in a position that it could not ship the lumber at all?

Mr. Wood: Yes, your Honor.

A. We could not get it forwarded; that was absolutely impossible; but if we had been able to do it, it would have been twice or three times the damages that are claimed here.

Q. I asked you to mark for counsel, Mr. Wheelwright, the voyages that the vessels went on that you have listed there in that list you have made up from Shipping Book 5.

A. If you will give me Shipping Book 5, I will put them down for you.

Q. The list is libellant's exhibit K.

Mr. Hayden: While you are making up that list, would you mind putting down the various ports at which you discharged lumber on some of those ships?

A. Well, I am putting down the ports where

(Testimony of Wm. D. Wheelwright—Resumed.)

they went. I put down the discharging ports, I cover in one word. They all went to Chinese ports, Japan, China and Manila, and none of them went beyond China. They went across the Pacific as I stated the other day.

Mr. Hayden: Those are northern Chinese ports, aren't they?

A. Yes, Shanghai and north of that.

Q. You have, however, Mr. Wheelwright, sent other vessels than these to Indian ports, have you not?

A. Oh, yes, quite a number, yes.

Q. Including Calcutta and Bombay?

A. Calcutta, Bombay, Karachi, Madras, Chittagong.

Q. Did you ever make any difference on those vessels on account of the fact they were going through the China Sea or the Indian Ocean?

A. No. They all went through the China Sea at all times, and we never made any difference on vessels going to India through the Indian Ocean or the Bay of Bengal.

Q. I think you wanted to mention the Strathern as an instance of what a deck load could stand in the way of severe weather.

Mr. Hayden: I think, if your Honor please, it would be quite evident it would be hearsay unless he showed he was present.

A. Well, our records show what they did, and the captain went over there, and his log shows.

(Testimony of Wm. D. Wheelwright—Resumed.)

Court: I will overrule the objection.

A. Will you give me that shipping book No. 8? The Strathern was one of our time-charter boats. She loaded on deck 799,000 feet. She was a little larger than this boat, but she belonged to a class of boats that were better carriers of deck loads than this boat, because they had a little more beam. That deck load consisted entirely of sleepers, 5 by 10, 9 feet long, which were not as easily secured as long lengths and bigger sizes,—very much more liable to go adrift.

Q. What do you mean by sleepers—railroad ties?

A. Yes, railroad ties. She occupied 35 days in going across the Pacific on an 18-day voyage. I examined her log in Calcutta with the captain, or in Madras. Some days she only made a single knot. And the captain said in all his experience of sailing seas he never had more terrific weather than he had on that voyage. It was one typhoon after the other. And he never lost a piece.

Q. Mr. Wheelwright, this contract for the sale to Gillanders, Arbuthnot & Co., as I understand it, was for 5500 loads, ten per cent more or less, and that ten per cent more or less has not appeared in those cables. I would therefore like you to explain how that comes into the contract.

A. Well, I don't know that it does come into the contract. There is a general understanding that when you say 3,300,000 feet, or anything else, for a

(Testimony of Wm. D. Wheelwright—Resumed.)

shipload, that it is ten per cent, but it is not an absolute custom, so that people do not always consider themselves bound by it.

Q. In the depositions taken in Bombay, they say the contract was for ten per cent more or less, and they take the ten per cent less therefore, which reduces the quantity they had a right to accept, and that operates, does it not, in favor of the ship?

A. Oh, very much.

Q. In the matter of these damages?

A. In the matter of their damages; yes cuts off a good deal.

Q. That is what I mean, as a matter of their damages against you, it reduces it?

A. Yes. 330,000 feet.

Q. Is that a letter that you received from Mr. Orrett?

A. Yes.

Q. In relation to this voyage?

A. Yes.

Mr. Wood: I offer that in evidence. The letter is marked "Libelant's Exhibit Q," and reads as follows:

(Testimony of Wm. D. Wheelwright—Resumed.)

"Tacoma, U. S. A., May 18, 1917.

REFER TO FILE NO. 525-1.

Pacific Export Lumber Company,
1004 Chamber of Commerce Bldg.,
Portland, Oregon.

Dear Sirs:

S. S. "SAIGON MARU" VOYAGE 1

We advised our principals by letter that we expected that the S. S. "SAIGON MARU" would coal at Muroran, and unless otherwise instructed would arrange for her to call at that port, as by so doing we would be able to take on less coal here, and more cargo.

Under date of May 17th, we received a cable from Osaka, referring to our letter, and instructing us to coal at Nagasaki, which, of course, we shall comply with.

Yours truly,

OSAKA SHOSEN KAISHA,

O:HN

Edwin Orrett, Local Manager.

Cy: 'Saigon Maru'—

Capt. Yanyo—"

Q. Is there anything further, Mr. Wheelwright, that you think of, that you would like to state for the information of the court?

A. Well, this letter of mine reminds me that we urged them to coal at Muroran, and he says, Mr. Orrett himself tried to arrange it, which would have

(Testimony of Wm. D. Wheelwright—Resumed.)

made five days less coal necessary and then we impressed upon the captain, in the violent discussions we had about the deck load and the large quantity of coal, that he had a cargo of fuel; he was in no danger of loss of life. Ships go further with a full cargo of steel, without an ounce of fuel, you might say, except the wooden fittings of the ship; and here is a full cargo of fuel. We have had boats burn part of the cargo as fuel.

Q. Is there anything further that you think of?

A. I don't think of anything.

CROSS EXAMINATION.

Questions by Mr. Hayden:

Mr. Wheelwright, you anticipate, don't you, that boats will take sufficient fuel so they don't have to burn their cargo?

A. Oh, yes, most certainly.

Q. And it is a condition of seaworthiness of a boat that she has sufficient fuel that she does not have to burn the cargo?

A. That is only in case of emergency that she burns the cargo.

Q. You wouldn't expect a boat to be considered as seaworthy, would you, if she didn't have enough coal on so that she had to resort finally to burning her cargo?

A. Well, that is a large order you are giving me.

Q. Well, I know it is.

A. There is no ship that crosses the Pacific that

(Testimony of Wm. D. Wheelwright—Resumed.)

takes sufficient coal to carry her over there in case she makes the longest record passage. It is never done. They coal for the usual passage and what they consider a sufficient margin for contingencies, somewhere about one-fourth. But in case of a vessel loaded with steel that is coaled for 20 days or 18 days, and then say 4 or 5 more for emergencies—24 days—and she takes 40, as has happened—this boat took 35—why, then, the extraordinary and the unexpected has happened.

Mr. Wood: You say this boat took 35?

A. This boat I was telling you about, the Strathern.

Mr. Wood: Not the "Saigon"?

A. Oh, no; not the "Saigon."

Q. So it is to be expected that, going across the Pacific Ocean, a vessel may, as you stated in connection with the Strathern—was it?

A. Strathern, yes.

Q. Only be able to go at the rate of one knot an hour, or one knot a day part of the time?

A. I say, on one day she made only one knot in the entire day.

Q. Yes. Now, in your experience, I presume you know that a slow vessel is apt to be very much more retarded by head winds and head seas than a speedier and more powerful vessel.

A. I should say that was an axiom.

Q. So that with a slow vessel, that might anticipate a voyage where she would have head winds

(Testimony of Wm. D. Wheelwright—Resumed.)

and head seas, her reserve of coal would necessarily, in good seamanship, be larger than the reserve of coal in a more powerful vessel?

A. No, I should say not, because the slow ships burn less coal—very much less coal.

Q. But I say the proportion—if I understood you correctly, Mr. Wheelwright, you said the proportion of the delay for a low power ship was greater than the proportion of delay for a high power ship?

A. No, I said that the slow ship with low power—that is the reason they are slow, and they don't burn so much coal. But I didn't say anything about proportion.

Q. Isn't it a matter of fact that a ship that only has power to drive her in fair weather seven and three-quarters knots an hour will be delayed by a head wind and head sea in greater proportion than a ship that will go 14 knots an hour in smooth water?

A. Oh, yes. A ship that goes 14 knots an hour burns four times as much coal as the one that travels $7\frac{3}{4}$.

Q. If the proportion then is larger, that is, the proportion of delay is larger, as against the slow ship than the speedy one, she will have to burn more coal, she will have more days, or more days' delay on the voyage across than the speedy one will have?

A. I don't understand your use of the word proportion. I tried to make it perfectly clear that a

(Testimony of Wm. D. Wheelwright—Resumed.)

slow ship is more liable to delay because she has lower power, sir. But she burns less coal than if she had more power.

Q. I understand that.

A. That is as far as I can go. I cannot go into proportion.

Q. I understand that. Now, let us see if you can understand what I mean. If the water and the wind were running against a ship that could make $7\frac{3}{4}$ knots an hour, at the rate of $7\frac{3}{4}$ knots an hour, she would not make any way over the ground at all, would she, in opposition to the wind and waves?

A. If the opposition of the wind and waves was equal to the power that she is able to exert, she would make no progress. That is what you say? Yes.

Q. The 14 knot boat, say, or boat twice her speed, subjected to the same adverse forces, would make $7\frac{1}{2}$ knots an hour, or 7 knots an hour?

A. I don't think you can figure that way. I am not enough of a mariner or an engineer to tell you. I don't know.

Q. Let us see if we cannot agree upon that, Mr. Wheelwright, because I think it is simple.

Mr. Wood: I submit to the court these questions are most argumentative, and it seems to me would require a naval architect to answer.

A. I couldn't tell you that, you know. You might ask that all day—I couldn't tell you. That is a matter of reasoning, and there are so many fac-

(Testimony of Wm. D. Wheelwright—Continued.)

tors entering into the shipping, different ships and different power, and I can only say in a general way that the consumption of coal in a high-power ship is altogether out of proportion to the speed. For a ship that makes 8 knots and burns 30 tons, a ship that makes 16 knots would be apt to burn 120. It is not twice as much speed that makes twice as much coal. It is an immense increase of coal.

Q. Suppose, now, just as illustration, you can row a boat up against the stream that is running three miles an hour against you.

A. I don't know that I could. I have done it perhaps.

Q. This is cross-examination, and let us answer the questions. Suppose a man can row a boat up a stream at three miles an hour by the exerting of a certain amount of power, and he then strikes a current which is six miles an hour, he will drift back down stream three miles an hour, won't he, using the same power?

A. Well, no, I should say the power that I used, or a man used, to row a boat against the stream at three miles an hour—I am supposed to make progress, am I, or keep her still?

Q. Let us put the question another way, if you can't understand it.

Court: These matters can be reasoned out to the court, can't they?

Mr. Hayden: I just want to bring them to the attention of the court so that if this witness is

(Testimony of Wm. D. Wheelwright—Resumed.)

capable of answering them, the thought will come out that a slow power ship needs more reserve coal in anticipation of striking rough weather than a high power ship would need.

A. You cannot draw that out of me, because I don't know.

Mr. Hayden: The same kind of wind. If the court has reasoned it out and come to the conclusion, it is all right without testimony. The same force that will stop a 7-knot boat will only have half that force on a 14-knot boat. In other words, a 14-knot boat will make 7 knots, or half of her speed, where a 7-knot boat will be at a stand-still.

Court: Well, that is theoretical.

A. I doubt it very much. I don't think it is so. It is mere theory. You can call a naval man, a shipping man, and he might tell you.

Q. You say that is a theory. I presume then a man who is running a ship and knows his ship would have better judgment on that matter than you would have?

A. Most certainly.

Q. And if he considered that it was necessary for him to take 1200 tons of coal do you think you would agree that his judgment would be better than yours?

A. I don't know that it would in this case. I say as a general principle a man that runs his ship and knows his ship would have better judgment than I. But when I have had experience of 40

(Testimony of Wm. D. Wheelwright—Resumed.)

ships, or more or less of the same size, and know what deck load they can carry, my judgment is better than his on the amount of deck load he can carry, because he has never done it, and he is scared to death. That was the trouble with that fellow—he was afraid.

Q. Please answer my question. I am talking about coal consumption. I understood you to say just a moment ago it was wholly theoretical as far as you were concerned; you didn't know about it.

A. Wait a minute. What was theoretical?

Q. Now, do I understand you to say you do know more about it than the captain of the ship?

A. No, I beg your pardon. I said your statement that a ship having a certain amount of power and going 8 knots, that a boat of twice that amount of power having power to go 16 knots, would go 8 knots when the 8-knot boat would not move at all. I say that is absolutely theoretical. I don't think it is sound. That is all I say.

Q. I asked you following that if the captain of the ship would not be the best judge as to how much a head wind would retard his ship, how much more reserve of coal he would require.

A. I should think he would, yes, sir, ordinarily.

Q. I wish you would be good enough to go through your books, please—are these all the books you have of shipments on ships you have sent with full cargoes of lumber, these nine?

A. Yes.

(Testimony of Wm. D. Wheelwright—Resumed.)

Q. You said a number of them have gone to Calcutta and Madras and Bombay, as I understood it. I may not have examined these books as closely along that line as I should have. I will be pleased if, before I finish the cross-examination, you would go through those books, or have someone else do it for you, and point out the ships that you sent to those ports out of the nine books.

A. All right.

Q. I don't mean to do it now. You can have somebody do it for you. The case will be going on. You can take that matter up later. You probably know the details about the kind of lumber that has been loaded on various ships that you sent out. For that reason I will ask you to explain why some of the ships carry a ten per cent deck load and some of your ships carry a 44 per cent deck load.

A. I don't recall any occasion where a ship of ours carried only ten per cent on deck, but it might easily be the case.

Q. That was the Sandhurst, shown in volume 5, at page 76.

A. Well, now, the reason why some carry smaller deck load frequently is that they have got what is known as a shelter deck, where the deck space is covered in, and so when it gets aboard in the space that is covered in it becomes under deck cargo although it is loaded in the space that is ordinarily an open deck; and that might have been the case with the Sandhurst. Another reason is

(Testimony of Wm. D. Wheelwright—Resumed.)

that sometimes we load a ship with part lumber and part flour and she wouldn't take any more.

Q. Stick to the Sandhurst.

A. I am answering your question exactly. You are asking why it is. I am trying to tell you.

Q. Yes.

A. They then cannot take on a full deck load of lumber without going down below their marks. You take a ship that is loaded under deck with flour. And she goes to her marks.

Q. I am not referring now, in any of these instances that I am asking you about, to any ship except those that have a complete cargo of lumber, unless I have made a mistake in the examination of your books.

A. Well, I am not sure what the Sandhurst took. You say that is the name, the Sandhurst?

Q. The Sandhurst, volume 5, page 76; list of her cargo.

A. Well, now, what do you want to know about the Sandhurst?

Q. I asked you why it is she only carried a ten per cent deck load.

A. She carried more than ten per cent.

Q. Your figures are what, then?

A. She carried a total cargo of 2,900,000 feet roughly, and she carried 450,000 of that on deck.

Q. 449,142, isn't it?

A. That is it exactly. That is a good deal more than 10 per cent.

(Testimony of Wm. D. Wheelwright—Resumed.)

Q. There is a mistake in the figures of the calculation. All right. There is a mistake there.

A. It is not very large though. I will admit it is a small deck load. Yes, it was put into my list here, Mr. Hayden.

Court: Have you got the percentage there of lumber on deck?

A. I have not in each case. I have only got it that the average of these boats was 26.38— $22\frac{1}{2}$ — $23\frac{1}{4}$ — $17\frac{1}{2}$; an average of the four of 22.39%; whereas the "Saigon" took 9%.

Mr. Wood: And those four you just mentioned were practically identical in dimensions with the "Saigon."

A. Almost exactly the same; almost exactly in length.

Q. And some difference in depth, too.

A. Well, the "Saigon" was 28 ft. 2.

Q. That is not her molded depth?

A. No, that is the total depth as against 26.6 of the other four.

Q. She is a deeper ship?

A. Yes, she is a little deeper. She carried 241,000 against an average of the other four of 743,000.

Q. Now, will you please look at the Ilford and tell me why she only carried 18 per cent. She will be found in volume 5, at page 124.

A. Well, in the first place, she left here in the winter, and sometimes in going across the Pacific a captain is timid about taking a large deck load al-

(Testimony of Wm. D. Wheelwright—Resumed.)

though the authorities generally agree they are quite as safe as a small one. She carried a total of 3,055,000 feet of which 477,000 went on deck, a little more than 15 per cent.

Q. Figure it out. It has been figured out for me as 18 per cent here.

A. 18. Well, you picked out the two low ships in this whole month I think.

Q. Oh, no, I beg your pardon. I will get some more for you before you get through. Will you take the Kalebea. That is in volume 6 at page 174.

A. When I said you picked out the two small ones I meant in the list that I had.

Q. Certainly, I understand that, Mr. Wheelwright.

A. Is there a Lloyd's book here? I saw one I think this morning.

Q. Yes, there is a Lloyd's book here.

A. I might tell from that. There is nothing here to show why she carried so little. She carried more than twice what your boat carried, I notice, however.

Q. Yes, and she had 3,000,000 feet under deck.

A. I cannot say why she didn't carry more.

Q. She had 17 per cent is what that amounts to.

A. Well, she was a double decked vessel, and that might have had something to do with it. It says here two decks.

Q. You mean a 'tween deck?

A. Yes.

(Testimony of Wm. D. Wheelwright—Resumed.)

Q. That didn't interfere with what she carried underneath any. She had 3,007,000.

A. No, but a double deck vessel, a vessel with two decks carries less on deck, you know.

Q. What?

A. A vessel with two decks carries less lumber on deck.

Q. You mean if she has 'tween decks? Didn't this vessel we are talking about have 'tween decks?

A. I don't know. I think very likely she had. I don't know though.

Q. Now, then, please tell me about the Suveric. That is found in volume 7.

A. Now, you can go through this and pick a few of these small carriers if you want to. Why don't you take the average? That is the only way to take it. I am not an expert. I cannot tell you why one carries a little more and some a little less.

Q. Will you pick out the Suveric in your own book, and in Lloyd's register also, if you wish.

A. Well I can answer about the Suveric, why she carried a small deck load, because in this book she is put down as having a shelter deck, and a shelter deck boat carries hardly anything on deck. The shelter deck covers the space that is usually known as the deck, and on which they carry their deck load.

Q. In other words, the higher the boat, that is, the more iron there is in the works, or the higher the boat, the less she carries on deck?

(Testimony of Wm. D. Wheelwright—Resumed.)

A. I don't want to go beyond what I say; that if the deck portion is enclosed by a shelter, necessarily she carries less on top of that shelter than if the shelter wasn't there and it all went on open space.

Q. What is the effect of a shelter deck? Is it not a continuation of the sides of the ship up to the level of another deck, which may be seven feet high?

A. It is the covering in of the deck space that we usually look upon to carry deck load; and of course if they cover that in it makes under deck space, and she carries less on deck than she otherwise would.

Q. Then if a ship is deeper she naturally will carry less on deck. That is, if her hold is deeper she will naturally carry less on deck?

A. I don't know that that follows, no, sir.

Q. Well, it follows in case of a shelter deck. Now, if instead of having three decks, the shelter deck the open deck and the 'tween decks, you simply have two decks in the same space, why don't the same principle apply?

A. I cannot tell you. You are getting into naval architecture.

Q. I thought you tried to qualify as an expert here when we started out with this. You said you had a good many years' experience.

A. I am expert on what deck loads ships can carry. I have had experience of 20 years here in it.

(Testimony of Wm. D. Wheelwright—Resumed.)

I know something about it. I don't claim to be an expert on architecture of a ship, though.

Q. Will you please look at the *Shintsu Maru*? She is found in volume 9 page 47. She only carried 110,000 feet on deck, about 5 per cent.

A. I don't see anything here to explain why she carried such a small deck load.

Q. Now, will you look then please at the *Queen Maud*, in volume 8 at page 133. She carried 13 per cent on deck.

Court: Do these records show that those ships were loaded, took their full cargo?

Mr. Hayden: I am just going to ask that question. I don't know. I take it that all these lumber ships are loaded to their full cargo. But I will ask Mr. Wheelwright.

Q. Is that so, Mr. Wheelwright, that all these ships are loaded with a full cargo of lumber?

A. Oh, yes, that is what we intend to do. But the *Queen Maud*—

Court: You have a ship here, the "*Saigon Maru*," that carried 241,000. Now, was she loaded with full cargo? I was wondering whether that applied to these other ships. Do the records show that they did all carry a full cargo?

A. They are supposed to.

Q. They are all supposed to?

A. Yes, they are supposed to. But this *Queen Maud* in particular carried a cargo of creosoted sleepers, which, having soaked up a large quantity

(Testimony of Wm. D. Wheelwright—Resumed.)

of oil, were very heavy, and in that case probably, as in many cases, the ship gets down to her marks, and we have to stop. There is no doubt that was the case in the Shintsu Maru, that she was down to her marks. That often happens. They are poor carriers, when you get them down to their marks. They get down to their marks before they get the full deck load, then we have to stop. But in this case, this ship had two feet to spare.

Mr. Wood: Three feet.

A. Two or three feet. We never load a ship below her marks. We stop right there whatever happens.

Q. Do your records show this ship Queen Maud was down to her marks?

A. It does not, but that is the conclusion from the fact she had that small quantity, because she is a good ship.

Q. Continuing looking at your record with regard to the Queen Maud, I think you will find she lost some lumber.

A. There wouldn't be anything here about it.

Q. I found it in there.

A. In this book?

Q. Yes.

A. Oh, well, I don't know why it should be. We wouldn't ordinarily put that in here. Perhaps you would point it out.

Q. It is somewhere there. Volume 8, page 133. It may be just the page before. It is usually in red

(Testimony of Wm. D. Wheelwright—Resumed.)

ink. Let's see if I can help you. "Lost part deck load on way to Muroran, estimated about 12."

A. I should suppose 12 pieces. I don't know. I have no recollection about it.

Q. That was a cargo of sleepers, you say?

A. That was a cargo of sleepers.

Q. Deck load of sleepers?

A. Oh, yes, the full cargo I think was sleepers. Nothing else. That is 12 pieces, Mr. Hayden, because the captain said that he turned out 39 pieces short, and she had on board some 48,000 pieces, of which he claimed she lost 12, and she turned out 39 pieces short.

Q. Well, it would be pretty hard for a captain to estimate exactly what would go overboard, I take it?

A. Yes, except he could tell a little——

Court: How much did you say went overboard?

A. Twelve pieces he estimated, but she turned out 39 pieces short out of 48,000.

Q. Now look at book 7, page 18, the *Elsa*. I have a note here that the cargo shifted.

A. *Elsa*. Well, I have it here.

Court: Can you answer that, Mr. Wheelwright?

A. I beg your pardon. I didn't know you asked a question.

Q. Yes, I asked you to explain if you could that it was not a fact that the cargo on the *Elsa* shifted.

A. I don't know anything about it.

Q. Don't your records show so?

(Testimony of Wm. D. Wheelwright—Resumed.)

A. Not to my knowledge. If you say it is here, I will admit it.

Q. I don't want you to admit it, sir. I might make a mistake.

A. I noticed she carried 746,000 on deck out of 2,881,000.

Q. She carried 20 per cent on deck.

A. More than that.

Q. 34 per cent on deck.

A. Yes, that is more like it. I don't know whether the cargo shifted or not, and I don't care. I don't know that that has anything to do with what we are talking about. Deck loads shift at times.

Q. They do?

A. Yes.

Q. You mean in connection with that that that occurs more or less frequently?

A. No, I think it is quite infrequent.

Q. But it does happen?

A. Undoubtedly.

Q. One of the things that you anticipate?

A. No, we don't, not at all. We look at the probable, not the possible, when we load ships.

Q. The Queen Maud is shown on page 131 of book 8.

A. You had her once before. She was the one that was loaded with creosoted sleepers.

Q. She was the one that lost—

A. Yes, lost the 39 pieces.

(Testimony of Wm. D. Wheelwright—Resumed.)

Court: You said twelve pieces.

A. Well, the captain put in his log that he estimated he had lost 12 pieces, but she turned out 39 pieces short. It might have been a mistake in the count, or it might have been that she did lose 39 pieces.

Q. How long were those sleepers? What is the length of them?

A. Five foot ten to nine feet.

Q. Now, Captain, I want to call your attention to the *Kalebea* in book 6, page 174.

Court: You referred to that also.

A. Yes, we had her, but if there is anything more you want to know.

Q. Yes, there is something more I wanted to ask you about. You estimated that she would carry. Mr. Wheelwright, according to your books, as I have it here, that she would carry 4,094,900 feet, and she actually carried 3,539,978 feet, or you overestimated her 555,822 feet.

A. Yes; bad lumber vessel—poor carrier.

Q. Now, if you will look at the *African Monarch* in the same book, at page 160, according to your records here, you overestimated her 129,829 feet.

A. Oh, yes, that is happening all the time, sir, all the time.

Q. So the best you would get about these ships is an estimate which may be over or under.

A. Quite true. One moment, there. There wasn't any such miscalculation there. We esti-

(Testimony of Wm. D. Whitewright—Continued.)

rated her to carry 3,213,000 and she carried 3,200,000.

Q. 3,175,000 it is here.

A. Well, that is not. It says here 3,200,000. That would be a difference of 35,000 feet on a ship of over 3,000,000 capacity. We estimated her deck as 700,000 and she took 765,000; somewhere about 5 per cent of her cargo.

Q. Well, I am taking those figures as they are given to me here. Let us look at the *Crusader*. I haven't the book number. Page 96. Well, look at book 6. You have that there, page 132. See about your estimate as regards the *Irish Monarch*.

A. The figures here are estimate of 3,500,000 and an actual of 3,407,000 gross or 3,400,000 net; a miscalculation of about 185,000 feet, a little less than 6 per cent. I can say in a general way that such variations as that are quite common. You can find a great many of them.

Q. I think so too, if we went through the books; only just illustration. Now, one of the books I find here referred to as having gone to California is in book 7. The *Scratchditch*.

A. Yes.

Q. And I find that she discharged a considerable quantity of her lumber before she undertook that trip down. Is that right?

A. Well, what book is that in, sir?

Q. That is in book 7.

A. I don't think I have it here. But here is

(Testimony of Wm. D. Wheelwright—Resumed.)

one that did go through to Calcutta, her sister ship, the Strathdene, and she carried 1,011,000 feet.

Q. What page is that?

A. Page 33 of book 8. She carried on deck 1,011,333 feet to Calcutta.

Q. What month?

A. She left here in October.

Q. That is the nicest season of the year down there.

A. Yes, it is a beautiful (?) season of the year crossing the Pacific.

Mr. Wood: You might explain that in the record as sarcastic.

A. I say beautiful satirically. I know, because I have crossed the Pacific twice in that month, and it is a very bad season.

Q. How many times did you cross the Pacific?

A. Altogether five.

Q. All in those months?

A. No, two.

Q. What other months did you cross in?

A. December.

Q. A nice month?

A. Horrible. Typhoons 18 days, and one fairly decent day in the 18.

Q. I think that is what you will find in those latitudes.

A. Very bad in October, November and December.

Q. You don't know whether this ship happened

(Testimony of Wm. D. Wheelwright—Resumed.)

to go through in a nice voyage, do you, the Strathdene?

A. No, I don't know anything about it, only she didn't lose any of her deck load so far as I know. It is only fair to say, as I told you, that she carried a million feet on deck, that the Straths are remarkably fine carriers of deck loads. They carry more than other ships of similar construction.

Q. Something peculiar about the ship that enables you to do that?

A. Well, she is short and broad.

Q. I think they are 370-foot ships, aren't they?

A. Yes, but they are short for their beam.

Q. They are shallow comparatively, too?

A. Yes.

Q. They are big, broad-beam ships, broad at the ends, both ends?

A. Yes. When they are loaded they are like a 12x14 stick of timber.

Q. Yes, keep on putting it on. Now, this Strathblain discharged a lot of her cargo before she ever started down through the China Sea? Didn't she?

A. She went to Port Arthur, as I recollect. No, Yokohama—Dalney—that is what it was. What do you want to know about this?

Q. She is one of the vessels, I think, you have given me as having gone down to Calcutta. I ask you if it is not a fact that she discharged a large part of her cargo in north Japanese ports?

(Testimony of Wm. D. Wheelwright—Resumed.)

A. Why, certainly. She stopped at various points along the way, and only went to Calcutta with a portion of her cargo. I didn't have her in mind at all about Calcutta.

Q. And she left here in April, on the 3rd of April, isn't it, and arrived in Yokohama on the 23rd?

A. Yes, April 3rd, and May 1st arrived Yokohama. She carried two million feet to Calcutta; probably all under deck.

Q. She had 2,632,507 feet under deck, when she left here?

A. Yes, apparently.

Q. Was the Bannockburn a shelter deck vessel, do you remember?

A. I don't recollect the name, even of that vessel.

Q. She was referred to in book 7, page 132.

A. She isn't in this book. No. 7, you say?

Q. Book 7, page 132, I have it here.

A. Bannockburn, yes.

Q. Do you know whether she is a shelter deck or not?

A. I don't see it here, and she has evidently dropped out of this book, so I can't tell you.

Q. She only carried a little over 11 per cent deck load. Anything else that might change that idea?

A. No, except that being—let me see—I guess I have her dimensions here.

(Testimony of Wm. D. Wheelwright—Resumed.)

Q. She carried 3,185,796 feet under deck.

A. She was very long, 400 feet, and that would tend to make her tender with a deck load.

Q. Her length?

A. Yes.

Q. What beam did she have?

A. 52.

Q. Got as much beam as the Strath boats have then?

A. Yes.

Q. She was longer than the Strath boats?

A. Yes.

Q. Yet she only carried 406,000 on deck?

Mr. Wood: She had a larger cargo under deck, did she not?

A. 460,000 on deck?

Q. 460,426.

Mr. Wood: Didn't she carry a large under deck.

A. She was not a good carrier, no.

Mr. Wood: May she not have been down to her marks?

A. I was going to say—I should say in all these cases where they carry these small deck loads either they become tender and we have to stop, or they get down to their marks. The latter is generally the trouble when you have a small deck load, it is because she is down to her marks, and we cannot put on any more.

Q. Will you look at the Croydon, please, in

(Testimony of Wm. D. Wheelwright—Resumed.)

book 7, page 114. She is one of the vessels that went to Calcutta. I see that according to my figures she had 2,217,041 feet under deck and 301,354 feet on deck.

A. Those are the figures here, yes.

Q. 13½ per cent. Now, will you look at book 9?

A. Just a second. I want to see if she is in this book.

Q. We have tried to find her in that book. She is not there. Will you look at the Kenkon II, book 9, page 88?

A. Yes, I remember her well.

Q. She was 341 feet long and 41.9 by 26.1. She had according to my figures here 1,681,137 feet under deck and 226,032 feet on deck or about 12½ per cent.

A. Yes, a very poor carrier; Kenkon Maru No. 11.

Q. It is eleven and not two?

A. I think so. But there were a great many of them.

Q. It is the one I mean. We are agreed on the one I mean anyway.

A. Yes. That is one of the worst carriers we ever had.

Q. She is one of those old tramps that were bought by the Japanese from somebody, wasn't she?

A. Yes, I guess so.

(Testimony of Wm. D. Wheelwright—Resumed.)

Q. What was the matter with the Shintsu Maru?

A. I cannot tell from this book. I don't think she was a shelter deck. Probably because she was down to her marks.

Q. She only carried 4.4 per cent on deck?

A. Well, now, it doesn't say on here shelter deck, but it says three decks and deep frame and for three-deck room, and that would indicate that she had very little deck space on which you could ship lumber. What book is she in?

Q. She is in book 9, page 47, 370 feet long by 46.23x26.3.

A. Yes. You say she is 46 beam?

Q. Only 26 feet molded depth though.

A. I was looking to see if we had made any estimate. I don't find we did.

Q. That is depth of hold instead of molded depth, 26 ft. 3 depth of hold. She is 29 ft. 3 molded depth.

Court: What is the object of taking up so much time in this?

Mr. Hayden: The object, your Honor, is this. I am trying to demonstrate to this court that there is more variety in ships—this court will understand, if we are permitted to go into the evidence of all these ships, that the mere fact that one ship carried a certain amount of lumber is no criterion that another ship will carry a certain amount of lumber on deck.

(Testimony of Wm. D. Wheelwright—Resumed.)

Court: I guess that may be conceded.

Mr. Hayden: Well, if that is so, I think I have gone far enough with it.

Q. Mr. Wheelwright, do you pretend to know anything about the rules of stability in a ship?

A. No, sir, only by observation. That is all.

Q. Have you observed from your observation that if you put 500 tons of lumber on deck instead of coal, if you burn the coal below the upper part will become heavier, or the stability of the ship less?

A. I know that if you take cargo out of the lower part of the ship, it makes her tender, comparatively speaking.

Q. Do you know the distance between Muoran and Bombay?

A. I do not.

Q. Do you know the distance between Nagasaki and Bombay?

A. No. I could easily ascertain it.

Q. Yes, I just wanted to know if you knew it or not. It was preliminary to another question. Do you know as a matter of fact that Nagasaki is substantially half way in sailing distance between Portland and Bombay?

A. Well, I don't know that; but I know that Singapore is a coal port, and we always figure, on the ships we send, to coal at Muoran, and then if necessary at Singapore. That is very much nearer Bombay.

(Testimony of Wm. D. Wheelwright—Resumed.)

Q. This vessel that you speak about in your exhibit, which is Exhibit K, the list of the steamers—the Elmbbranch I am referring to, she was that turret deck ship?

A. Yes.

Q. She doesn't compare at all with any of these other ships?

A. Not at all.

Q. While I am on that subject of ships again, you read out of Lloyds that the Shintsu Maru was a three-deck rule?

A. Yes.

Q. You don't know what that means, I take it?

A. That was not what I called attention to. It says three decks, doesn't it?

Q. I wanted to make that clear. We will look at the Shintsu Maru again and see if it doesn't say three-deck rule instead of three decks.

A. Yes. Doesn't it say she is three decks too?

Q. They have a teak-wood deck on top of an iron deck, which gives them another classification, which they call three-deck rule. She is only a two-deck ship.

A. Is this the one. This is the Shintsu Maru, two decks. You are right. I am mistaken. Steel U peak; deep frame. Three-deck rule.

Q. Now, according to the examination of your book 9, at page 47, it shows this vessel only had ordinary rough lumber.

Mr. Wood: Which vessel do you speak of?

(Testimony of Wm. D. Wheelwright—Resumed.)

Q. The Shintsu Maru.

A. I don't know.

Q. Well, I might confirm that. This will be the record here. Have you that volume 9 there?

A. I put them all over there. I thought you were through.

Q. I don't want any misconception to get in the record in connection with it, that is all, or anything that will lead to misconception in the record. Just look and see if that is not just ordinary lumber, this cargo.

A. I don't think there is anything here to indicate what kind of lumber it is. It probably was rough lumber.

Q. You find that on page 47, the lumber?

A. Oh, no, no. They were sleepers.

Q. Sleepers?

A. Largely. In fact, it seems to be all sleepers.

Q. All sleepers?

A. Yes, ties; railroad ties.

Q. Were they creosoted?

A. No, I should think not.

Q. If they are not creosoted they are not any heavier than ordinary lumber, then, are they?

A. No. Another thing I notice about her she had only bunker capacity of 320 tons. That forces a great deal of coal to be carried outside, you know, in cargo space. That is one reason why she would be a small carrier.

(Testimony of Wm. D. Wheelwright—Resumed.)

Q. Well, that might affect her under deck, but that would not affect her over deck.

A. No.

Mr. Wood: Well, it would if they carried coals on deck, wouldn't it?

Mr. Hayden: It might if they carried them on deck.

A. They frequently do, you know, carry some coal on deck.

Q. How much coal did she have there? Does that show?

A. Yes. I have got it here somewhere; generally have it.

Q. I think she had 1106 tons on board. I have it here. She consumed 849 tons.

A. In what time? What voyage 849?

Q. I cannot tell you that.

A. Well, I ought to have the coal statement here.

Q. It is there. I got it out of that book. It is there. To Muroran; it has consumed 849 tons to Muroran. She has 300 tons left, 311 tons left when she got to Muroran. She took on 700 tons at Muroran and went to Calcutta. She left for Calcutta in January, and she carried 4.4 per cent deck-load. She had under deck 2,464,363 feet. She was 370 feet long by 46 feet beam by 26 feet 3 inches depth of hold.

A. She was a large carrier of coal, too.

Q. A large burner of coal too, wasn't she?

A. Oh, must have been.

(Testimony of Wm. D. Wheelwright—Resumed.)

Q. I want to ask just one question about this. You say here in this letter, "We have before us a memorandum showing the steamer's dead weight capacity as 6,779 tons." Was that from the captain of the ship you got that?

A. Yes, I don't know what that is.

Q. It is a letter you wrote to Mr. Orrett.

A. About this boat?

Q. Dated June 5th, about this boat.

A. I don't know where that came from.

Mr. Wood: What boat are you speaking of?

Mr. Hayden: The Saigon Maru.

A. Showing that the steamer's dead weight capacity is 6,779 tons. I don't know where it came from now.

Q. You thought it was accurate at that time, I should say.

A. Well, I should not have put it down if I hadn't thought so. But I am surprised; I supposed it was greater.

Q. You were the ship's agent down here as well as the charterer of the ship, weren't you? That is, you were disbursing agent?

A. I think not.

Q. I thought you were.

A. We always let them have money, or do whatever the owners want. I don't remember that we were. Mr. Orrett was near by.

Q. What did you hear about this attempt of Mr.

(Testimony of Wm. D. Wheelwright—Resumed.)

Genereaux and Captain Hoben to make a test of the ship in this respect I mean?

A. I can't remember much about it.

Q. Did they tell you that the captain would not let them make the test?

A. I don't remember that now.

Q. This letter of yours—

A. That will help me refresh my memory.

Q. This letter of yours of the 5th of June, where in you set out a number of complaints that you have, does not mention it, and that is why I wanted you—I don't want you to read the letter out loud, but just find out if that refreshes your recollection on that point that I have asked you about. You don't mention it in the letter.

A. Well, I don't recollect that. I only know that we could not do anything with the captain, he was so timid, scared to death.

Q. You mean he was so set in his ways about not taking any more cargo.

A. Yes.

Q. That is what you meant, wasn't it?

A. Yes, he was frightened.

Q. He was absolutely set on not taking any more cargo?

A. He was frightened about going to sea with a decent cargo. He wanted much more coal than he needed.

Q. As a matter of fact, the captain was so set about not taking any more cargo that he cut the

(Testimony of Wm. D. Wheelwright—Resumed.)

stanchions off so you could not put any more cargo on, didn't he?

A. I remember that he did. That is before he could possibly have found out how much the ship would carry, showing he was determined on not carrying a decent deck-load. He cut the stanchions off before he found out that it was not safe to carry deck-load of that height. I had forgotten all about that.

Q. By reason of that fact you noted and wrote to Mr. Orrett that he had sacrificed the owners to the extent of \$27,000 in freights?

A. Exactly what he did, yes, sir.

Mr. Hayden: I think that is all regarding the loading of the ship. Mr. Huffer desires to interrogate on the contract.

Examination by Mr. Huffer:

Q. Mr. Wheelwright, the big sticks, certain number of big sticks, amount of big sticks that would go into the cargo, these are more valuable than the other ordinary lumber?

A. The longer length are, yes; not the large sizes necessarily; the long lengths.

A. And it was the longer lengths that it is claimed were shut out by failure to carry?

A. Well, I think a portion, because we had planned to ship them on deck.

Q. Yes. But those long lengths you had planned to ship on deck and put them on top of the 241,000 feet that was loaded?

(Testimony of Wm. D. Wheelwright—Resumed.)

A. Oh, no. The 241,000 feet, I think, consisted largely of long lengths.

Q. Oh, yes. So there was on the ship a due proportion of the long lengths?

A. No, I shouldn't say a due proportion. There was a portion. There were some of the long lengths on deck.

Q. But what I am getting at is that the long lengths were of a higher market price.

A. They are more valuable.

Q. Yes, and more valuable at Portland?

A. I guess everywhere; more valuable in Bombay.

Q. Now, referring, Mr. Wheelwright, to Libellant's Exhibit L, which is a statement of the expense of getting this lumber from Portland to Bombay, I notice that you took out both the ordinary marine insurance and war risk insurance. That is one of the items that constitute the cost of getting the lumber there?

A. Well, yes. Cif is cost, freight and insurance, and when the war came on it was always a question whether it was war risk or not; and it was not considered that we had to provide war risk unless stipulated. That c. i. f. did not include war risk, but they put in their contract war risk, I think.

Q. Including war risk?

A. Yes; and we had to submit to it, as I recollect.

Q. So in order to estimate the cost of getting

(Testimony of Wm. D. Wheelwright—Resumed.)

this lumber to Bombay you had to figure, not only freight on the lumber, but also the cost of the insurance and the war risk?

A. Yes, sir.

Q. Were there any other expenses incident to it? Were there any other expenses that would be incident to getting it there?

A. I should say not. The freight, insurance, the war risk and the cost of the lumber, what we paid for the lumber.

Q. Yes. Now, would the insurance and the war risk on the lumber that was not shipped, that is the rate of insurance, have been the same as it was for the lumber that was actually shipped?

A. You mean per thousand feet?

Q. Yes.

A. Well, I should say it would be a little more, on account of the higher value.

Q. Would it be the same on the basis of value?

A. Same rate?

Q. Yes.

A. Oh, yes, same rate.

Q. Same rate on basis of value. Now, when on June 4th you learned that the master of the vessel was not going to take any more than he had then on deck—241,559 feet—did you notify Gillanders, Arbutnot & Co. of that fact?

A. I don't think we did. I wrote to them about it, certainly.

Q. Well, that would be rather a tardy means.

(Testimony of Wm. D. Wheelwright—Resumed.)

It takes six weeks, doesn't it, to get a letter to Bombay?

A. No. Well, it does now, but we figured it then a little over 30 days. Five weeks would cover it.

Q. Why did you not cable to them, Mr. Wheelwright, so they could be on their guard?

A. I saw no reason for doing it. What could they do about it?

Q. Didn't you apprehend they might tie themselves up with a contract of sale in turn?

A. Well, I don't know that I thought of it. I don't remember now whether I did or not.

Q. Now, this claim of Gillanders, Arbuthnot & Co., when was that claim, or the fact that they had a claim against you first communicated to you?

A. I can't remember exactly, but I think it was following the discharge of the cargo that they wrote they were short so much they suffered heavy damage. I knew that they would make a claim. I was quite sure of that.

Q. Yes. Now, you got a letter to that effect?

A. No doubt of it.

Q. Will you produce that letter?

A. I can, yes. I haven't it here.

Q. You will tomorrow?

A. I would like to make a memorandum. There is something else you wanted here about these cargoes.

Mr. Hayden: Yes, I wanted you to get the car-

(Testimony of Wm. D. Wheelwright—Resumed.)

goes; if I have mentioned them all. I think I have, but I may not have.

A. You want cargo to Calcutta and Bombay, is that it?

Mr. Hayden: Yes, lumber cargoes; wholly lumber cargoes.

A. You mean our cargoes?

Q. Yes, your lumber cargoes I am talking about, full cargoes of lumber.

A. Yes.

Q. Now, they sent you that letter, and then there was some correspondence about the claim, was there, besides the letter?

A. Yes.

Q. Would you kindly bring the rest of the correspondence.

A. Yes.

Q. What arrangement did you make with them about paying the claim, Mr. Wheelwright?

A. Well, in the first place, we expected them to enforce a claim against the ship in Bombay. I remember writing them—that will appear in the letter—that we had reserved all rights we thought by our action here, and we thought they could get the money out of the ship. That is what we hoped they would do, and therefore that there would be no claim on us. We knew it was the ship's fault, the captain's fault, and naturally we looked to the ship for protection.

(Testimony of Wm. D. Wheelwright—Resumed.)

Q. And then what was your final arrangement about paying them?

A. Well, there has been no arrangement. We asked them to await the result of the suit, which they were willing to do. As I told you, when these claims have to be paid, there is always great liberality exercised.

Q. They were to be paid on condition you were successful in this suit?

A. Oh, no, no, sir. It was a claim on us that we recognized. I don't know that we fully recognized it until I went over and saw them and had a talk with them; and I remember saying to them that we didn't see eye to eye with them in regard to this claim in the first instance.

Q. You went over there when?

A. Well, I went over there last year this time. I was in Calcutta in January.

Q. 1918?

A. Yes; left here the 20th of November, 1918, and was in Calcutta for about a month, the month of February.

Q. In your libel in this case that was filed by you, you mention that claim of Gillanders, Arbuthnot & Co. as one of the items of your claim in this suit.

Mr. Wood: I don't know that that is in the libel.

A. That was in June. Well, if I did, I did it because I knew that they would make the claim and we would have to pay it probably.

(Testimony of Wm. D. Wheelwright—Resumed.)

Mr. Huffer: I think that is all.

Court: Is that all?

Mr. Wood: Yes, unless Mr. Wheelwright thinks of anything more that would throw light on the case.

Court: I think you better have him get the lumber value on the second of August. I don't know what value it is going to have, but I think we ought to have the evidence in.

Mr. Huffer: I would like, while the witness is on the stand, to have these bills of lading marked for identification. Are those the bills of lading that were received by you for the lumber cargo on board the "Saigon Maru" on the voyage in question?

A. Yes, sir, they are.

Q. And that is your indorsement on the back?

A. It is the indorsement of our company, but not by me individually.

Q. That is what I mean, your company.

A. Yes.

REDIRECT EXAMINATION.

Q. Mr. Wheelwright, one question, several times in the cables and correspondence reference is made to a "firm" offer. I don't quite understand the meaning of that myself. I would like to have you explain it in the record.

A. Well, it is really a superfluous word. When we say "we offer", why that is a plain statement; it ought to be enough; but we have got in the way

(Testimony of Wm. D. Wheelwright—Resumed.)
of saying "Is this firm?" That is, is it an absolute offer.

Court: Is that the last one?

A. Yes, is that one we can go right ahead on and close the ship. For instance, we make a firm offer good for one week, we say. But it is really a superfluous word. There is no need of it. It is habit.

Q. If anything, it adds strength to the offer, if that could be done?

A. Yes, that is the idea, emphasizes it.

Mr. Wood: I think that is all. Of course Mr. Wheelwright will have to take the stand when he gets this information.

Excused.

Mr. Wood: I wish to offer in evidence log book of the "Saigon Maru" on this particular voyage.

Marked "Libelant's Exhibit R."

Mr. Wood: I offer in evidence and will read the deposition of A. Clapham, taken pursuant to stipulation between Mr. Huffer and myself.

Fifth Interrogatory objected to as incompetent, it being shown by the testimony that whatever contract there was was in writing.

Objection overruled. Exception allowed.

Same objection to Sixth, Seventh and Eighth Interrogatories.

Mr. Huffer: I do not want to interrupt the proceedings of the court by insisting on this objection

(Testimony of Wm. D. Wheelwright—Resumed.)

Mr. Huffer: I might explain, your Honor, that the depositions that were taken in the Orient were taken subject to objections to be made at the time they were read in evidence, while those that were taken at Tacoma, where counsel were present, were subject only to objections taken at the time of taking the objection.

Court: Very well.

Mr. Hayden: I will now read the deposition of Y. Yamamoto, taken on the 12th day of February, 1918, in Tacoma.

Reading of deposition begun.

Adjournment until 10 A. M.

Portland, Oregon, December 17, 1919. 10 A. M.
Deposition of Captain Yamamoto continued.

While reading the deposition, at page 42, Mr. Hayden explained as follows: I want to explain to the court why we have not the deposition of Kawahara. We sent interrogatories over there. He was the man that took the measurements and made the calculations as to the metacentric height of the vessel, and he died unfortunately, and the other man was simply an assistant, so we could not get from him any more than we got from the captain; that is, we could not get detailed figures in evidence of the result of his testing this vessel for her metacentric height.

It is agreed between Mr. Wood and Mr. Hayden that the answer "480 feet" on page 42 is a mistake.

(Testimony of Wm. D. Wheelwright—Resumed.)

Reading of deposition of Captain Yamamoto concluded.

Deposition of Toru Yamaguchi offered and read in evidence.

Deposition of Y. Yano offered and read in evidence by the Respondent.

WILLIAM D. WHEELWRIGHT resumes the stand.

CROSS EXAMINATION—Continued.

Questions by Mr. Hayden :

Q. I asked for ships that went to Bombay.

A. They are all here. Where the deck-load is put down, I say "Discharged at intermediate port"; but I made the whole list, what there is in the book.

Q. Well, have you a list which gives the deck-loads on ships that went down in the Indian Ocean with a full cargo of lumber?

A. They are all here. The others if you don't want them are easily stricken out.

Q. Well, all right. Read those that went down to the Indian Ocean with full deck-cargo.

A. The first one is Ventnor, sailed 31st December, 1901, from Vancouver to Calcutta, with 2,417,000 feet under deck and 589,000 on deck. The Crusader, February 19, 1907, 2,731,000 under, 611,000 on. Then came two that didn't go; we took their deck-loads off. You don't want those. Strathern 2,990,000 under, 799,000 on, November, 1912. Strathdene 2,628,000 under, 1,011,000 on, September, 1913.

(Testimony of Wm. D. Wheelwright—Resumed.)

Queen Eugenie 2,975,000 under, 568,000 on, May, 1914. Queen Maud, 3,159,000 under, 422,000 on, August 27, 1914. Lord Sefton 2,960,000 under, 594,000 on, July 15, 1914. Shintsu Maru, 2,464,000 under, 110,000 on, January 9, 1915. Kuro Hemi Maru 2,495,000 under, 305,000 on, May 13, 1915. Kenkon Maru 11, 1,861,000 under, 226,000 on, June 18, 1915. Then I have the Nukon Maru, but I have no details. That is the whole list.

Q. As I understand it, all of these vessels you have just referred to were either to Calcutta or Bombay?

A. Yes, or Karachi.

Q. And discharged the full cargo at either the one or the other of those places?

A. Karachi some of them went to, just above Bombay.

Court: Did you lose any of the cargo on any of those trips?

A. No, nothing, your Honor, except that one we were discussing yesterday, on which the captain said he thought he lost 12 pieces, and she turned out 39 pieces short.

Court: That is not on this list.

A. Yes, that is one of this list.

Mr. Wood: That was 39 pieces in 48,000.

A. Yes, 39 pieces out of forty odd thousand.

Mr. Wood: And those were sleepers?

A. Yes. I want to correct my testimony of yesterday. I was asked if we cabled Gillanders about

(Testimony of Wm. D. Wheelwright—Resumed.)

this cargo and the shortage, and my recollection was that we had not done so; that we wrote them. But I find, on looking over the letters, that we did cable them about the shortage, about the short deck-load.

Court: That was done at what time?

A. At the time the ship sailed. When we had exhausted all means to get him to take more, we then cabled them how much she had. And it will come out in the correspondence which I will testify from. Then I was asked to give a better judgment about the market price, and I have made several inquiries, with this result: that I can testify that the market price of such lumber as that here on the second of August, 1917, was \$20 to \$22 a thousand feet on the basis of "G" list. That corresponds almost exactly with what I said yesterday about an order being taken at a through price that was worth more than base, because that came from a mill that is generally low.

Court: That was on the 26th of July?

A. That was on the 26th of July. And reading over the letters I can see there was a constantly advancing market all through the spring and summer.

Mr. Huffer: What basis is the "G" list?

A. The "G" list has \$20 as the base price, and then the additions are made according to the extra value, of certain values that are worth more than the \$20 sizes.

(Testimony of Wm. D. Wheelwright—Resumed.)

Mr. Huffer: Now what was the price you gave a moment ago?

A. \$20 to \$22.

Examination by Mr. Wood:

Q. Just while you are on that, Mr. Wheelwright, an intimation was made here the other day by Mr. Hayden that in arriving at the proper measure of damages the fact should be taken account of that you could have sold here in Portland this cargo that was left behind, as I understood him, on an advancing market, and so have reduced your damages.

A. Oh, that was out of the question, because when we buy of a mill and place an order with a mill, the contract is completed by the delivery to that vessel of what she will take, unless we find some other means of forwarding the same. But they would not let us have the lumber to sell.

Q. In other words, their contract with you in this particular case was completed when they furnished to the "Saigon" all she would carry?

A. It certainly was, except that if we came along and said "Here is a shortage and here is a vessel that will take it," they would have let us have it for the same port. But to let us have the lumber to resell it, they would not do that. Then again, we could not do it. The lumber was suited to Bombay. It was not suited to other places.

Court: You actually did not purchase more lumber than what was stowed on this vessel?

(Testimony of Wm. D. Wheelwright—Resumed.)

No, we did not get a foot except what went by this vessel.

Court: Although they had a right to take from the mill more?

A. Yes, if the vessel would have carried it.

Mr. Hayden: It never was cut.

A. No, I don't think it was cut, or if it was they kept it. Nothing was ever said about it.

Q. That I understand is the regular practice in your business?

A. Oh, yes, that is the custom of the business.

Q. Now, have you something there you were about to speak of?

A. No, this is all.

Q. Now, Mr. Huffer asked you to produce the correspondence with Gillanders, Arbuthnot & Co, in which they asserted their claim. Before we get to that however, I will ask you to read the letter that you wrote to them, dated March 21st, confirming your cables, which confirmed the sale.

A. Yes. It is quite a long letter. Is it necessary to read it?

Mr. Huffer: Might as well get it in.

A. This is dated the 21st day of March, 1917. "Messrs. Gillanders, Arbuthnot & Co., Calcutta, India. Dear Sirs: We wrote last on the 19th, and have now the pleasure of confirming our cable of yesterday as per list herein, which was as follows: 'We confirm sale (sent March 20th, 1917), chartered Saigon Maru Shall we repeat if we can Others

(Testimony of Wm. D. Wheelwright—Resumed.)

including Japanese inquiring actively Inform Henderson If there is no objection suggest they make firm offer by telegraph For your private information only Steamer as per our telegram of 31st day of January Sold for March shipment Cannot proceed in consequence of Detained by the authorities Prospects are very doubtful.' ” I explain there by saying if ship had been chartered to go to Bombay and the Government had stopped her, we thought our friends would like to know that. It might help in selling this cargo. (Reading): “We wrote last on the 19th, and have now the pleasure of confirming our cable of yesterday as per list herein, which closes the sale to your good selves of a full and complete cargo of Oregon Pine lumber of merchantable quality, for shipment in April-May, subject to possible detention, by the S. S. ‘Saigon Maru’ due to arrive here on the 20th of May next, at a minimum loading rate of 300,000 ft. per working day. It is expected, however, that she will load much faster than that, as stated in our letter of the 19th, but perhaps we were somewhat optimistic in saying five or six days—seven would have been safer. The steamer is on the regular line of the Osaka Shosen Kaisha, and proceeds from Singapore via Hong Kong and Japanese ports to Tacoma, where she is represented by them as being due on the 11th of May, so that we have no reason to expect detention except by some unforeseen circumstance. The quantity is understood to be 3,300,000 ft., the usual 10% more

(Testimony of Wm. D. Wheelwright—Resumed.)

or less, and the cargo is to be furnished in accordance with the enclosed schedule called 'Adnexa', (which was a modification of Adneci) "which you will observe calls for 3,300,000 ft. including stowage, and any variation from this schedule will be in proportions of the various items, as nearly as possible, but of course not exactly. You are to receive the lumber at the rate of at least 300,000 ft. per working day at Bombay, and that condition will appear in the charter party. The price is one hundred and eighty shillings sterling (180/—) per load of 50 cubic feet (say 300/— per M ft. B. M.) on the basis of 'G' list, c. i. f. Bombay including war risk, payable by our ninety days' sight draft on London under a bank credit to be opened by your good selves in due course, the draft to be for full invoice value, including freight, and the usual shipping documents, viz: invoice, bills of lading, and insurance and war risk policies, to be attached to same. (This condition as to bank credit is in accordance with our cable of Mar. 3rd and your reply received here on the 9th *idem*, referring to that cable)." The next paragraph does not relate to this.

Mr. Huffer: Now, the list "Adnexa". I would like to have that in the record, because we may have to introduce some testimony ourselves on the subject of market value.

A. I will have a copy made and attached to this letter, or do you want me to read it?

Mr. Huffer: Yes.

(Testimony of Wm. D. Wheelwright—Resumed.)

A. Schedule "Adnexa" referred to:

"Adnexa"

800,000 feet	12x12	24 to 34 ft.
1,000,000 "	12x12	35 ft. & up; average 40 ft.
40,000 "	1x12	
40,000 "	1½x12	
40,000 "	2x12	
40,000 "	2½x12	
240,000 "	6x12	
40,000 "	3x 5	
80,000 "	3x 8	
80,000 "	3x 9	
80,000 "	2½x 4	
80,000 "	2½x 8	
80,000 "	2½x 9	
40,000 "	2½x 5	

All beginning with 1x12 16 ft. & up.

160,000 feet 8x8 20 ft. & up.

160,000 " 8x8 20 ft. & up.

Total 3,000,000 feet.

Necessary stowage in 3 inch and under 12 to 15 ft. long."

Mr. Wood: Now, Mr. Huffer, this correspondence with Gillanders, Arbuthnot & Co. is quite lengthy. I don't know whether you want it in the record or not, but here it is.

Mr. Huffer: I will look it over.

A. I had copied off the relative portions of it. If you want to hear it I can read it from this, and put that in.

(Testimony of Wm. D. Wheelwright—Resumed.)

Court: Unless, Mr. Huffer, you want that in the record, there is no use taking up the time with it.

Mr. Huffer: I have not had an opportunity to look at it. We might identify this correspondence at this time.

Mr. Wood: Oh, I think if you want to look at it, you better look at it now, because if it is going in Mr. Wheelwright might want to make comment on it.

Mr. Huffer: How would it be if we could proceed along some other line while I look at this?

Mr. Hayden: I will read the deposition of

KAWAMOTO FUDESUKE.

(Reads down to Interrogatory 12).

Mr. Hayden: I will say, your Honor, there are some differences between the Japanese measurements and our own, I think.

Mr. Wood: It appears from that he overestimated the deck cargo by 148 tons.

Mr. Hayden: Maybe it got wet by that time. If your Honor please, I think there is considerable difference in the matter of estimating the weight of lumber. I know it has been testified to that it is between three and a half and four pounds, lumber that is loaded, and Mr. Wheelwright says it weighs 3.35 in a letter that he has written to us. I think that all of us will find there is some variation in the weight of lumber. And I think you said so yourself.

(Testimony of Wm. D. Wheelwright—Resumed.)

TESTIMONY OF MR. WHEELWRIGHT—

Continued.

A. Oh, yes, I said three to three and a half pounds a foot, and I think also in some cases in extremely wet weather, it might run up to four pounds; and then we have known it to weigh less than three. It varies very much.

Q. (Mr. Hayden). I have taken your calculation of 3.35.

A. 3 to $3\frac{1}{2}$.

Q. 3.35 pounds is what I have taken your calculations.

A. I don't understand.

Q. 3.35 pounds to the board foot.

A. Oh, I didn't say that.

Q. Your letter gives that calculation.

A. No, three thousand pounds to thirty-five hundred pounds to one thousand feet. That would be 3 to $3\frac{1}{2}$ pounds to the foot. I think you must have misunderstood me.

Q. Well, 3.35 pounds to the foot is less than $3\frac{1}{2}$ pounds.

A. Yes.

Q. I saw a letter that you wrote to the O. S. K., you put the weight at 3.35 pounds per board foot, and I have taken it in that calculation instead of $3\frac{1}{2}$. I have taken it at less weight.

A. I don't know how I ever could have said that. I think it is a mistake.

(Testimony of Wm. D. Wheelwright—Resumed.)

Q. You didn't say it in so many words, but you said it in tons. You said the weight in tons, and I took and divided that weight in tons by the cargo which she had.

A. Well, it wouldn't be very far off anyway.

Mr. Wood: It would be substantially the same, wouldn't it? You say the weight is 3000 to 3500?

A. Yes, 3 to 3½. But I don't think it would average as high as 3.35. I think that is too much. We are shipping it all the time, and we seldom get up as high as that.

Mr. Hayden: Well, I simply took your own letter. I want to find that letter and have it identified. It is the weight you gave for this lumber when you were writing to Mr. Orrett, so I have taken your figures.

Mr. Hayden concludes reading deposition of Kawamoto Fudesuka.

Mr. Wood: I want the objection to go in the record that the man has not had any experience in this business.

Court: The objection is overruled.

TESTIMONY OF MR. WHEELWRIGHT—

Continued.

Mr. Wood: Counsel has inspected this, and now wants to use some of it. If any of it goes in I want it all to go in.

A. I would put it in in connection with my testimony.

(Testimony of Wm. D. Wheelwright—Resumed.)

Examination by Mr. Wood:

Q. I will ask you, Mr. Wheelwright, to read into the record correspondence with Gillanders, Arbuthnot & Co. about their claim.

Mr. Huffer: Each letter should be offered separately, each cable.

Court: Why couldn't that be put into the record, and when you come to the argument read it?

Mr. Huffer: Subject to objection.

Mr. Wood: We can just offer them as they are.

Mr. Huffer: Subject to any objection that counsel may be advised at the time.

Mr. Wood: My object, however, in keeping Mr. Wheelwright here was that, if Mr. Huffer wants to cross-examine on any of this correspondence or make any point of it, I want him to indicate now what it is so that Mr. Wheelwright can be examined on it if necessary.

Court: You want it offered. I suggest it go in the record, and then you can make such comments on it as you please when you come to the argument.

Mr. Huffer: I am going to examine the witness.

Q. Without my reading all these letters into the record, Mr. Wheelwright, if there is anything in any of them upon which you wish to comment, I will ask you now to do so.

A. I will make the story as short as I can. I won't read all this. On the 4th of June—this is correcting my testimony of yesterday—we cabled Gillanders saying that the "Saigon" was clearing with

(Testimony of Wm. D. Wheelwright—Resumed.)

4450 loads; that surveyor's report said she could carry more on deck; that we could not compel boat and we had protested. To which they replied—and this is the beginning of their claim—"Referring to your telegram of 5th: if steamer sails without loading full quantity telegraph specification shipped. Particulars urgently wanted. We think question shortage better remain over time being." And then they wrote on the 6th of June acknowledging this cable of ours and saying, "It is quite clear that your sale to us was for a quantity of 5500 tons at 9 pounds per ton of 50 cubic feet, the sale allowing you to ship 10 per cent more or less." Ten per cent less gives a minimum quantity of 4950 tons, so that in only shipping 4540 tons there is still a balance due to us of 410 tons. What, however, to us is even more serious than this is that you have practically shipped in full the inferior sizes and have shipped very short the superior sizes. The most superior size is of course the 12x12 squares 35 feet and up, of which quantity we ordered 1500 tons and you have only shipped 920 tons. The size we next most wanted was 12" by 12"x24/34", of which we ordered 1000 tons and you have only shipped 810 tons. These two sizes are very particularly wanted in India and as we feel sure you must have been aware that we should want these sizes above any of the others it is a great disappointment to us that your shipment is particularly short in these valuable squares. Disregarding in the meantime the pro-

(Testimony of Wm. D. Wheelwright—Resumed.)

fit that we should have been able to make on the minimum shortage of 410 tons, the market with you since we purchased the cargo has advanced at least 2 pounds 10 per ton, so on this account alone we have lost the sum of 1020 pounds. In our telegram of 6th June we telegraphed to you that we thought the question of shortage had better remain over until we knew what you had actually been able to ship. The loss to us in your not having been able to ship the minimum quantity of 4950 tons is not by any means, as we are quite sure you are aware, confined to a sum of 1020 pounds but is very considerably more than this as supplies of pine are very short in India. Pine squares particularly are selling at very high prices. We have decided not at any rate in the first place to put forward any distinct claim, feeling quite sure that you will see your way to meet us as far as possible in this matter and we now look forward to hearing from you."

Q. Mr. Wheelwright, you just said the date of that letter was the 6th of June. On the copy I have it is the 22nd of June, Calcutta.

A. Well, I may have confused it. The 22nd of June. Well, it says "Your telegram of the 5th June." My mistake. The 22nd of June is correct. Now, I put in an extract from our letter to them, in which I discussed this claim and told why it was that the lumber was short. On the 4th of August they wrote us: "Saigon Maru. We note that the short shipment of about 410 tons by this steamer was due to

(Testimony of Wm. D. Wheelwright—Resumed.)

the captain refusing to take a full and reasonable deck-cargo. We wrote to you on 22nd June giving you particulars of our loss on account of difference in price, on the 410 tons short shipped, owing to the market having advanced since we purchased from you," etc. "We note that you think it will be quite in order for us to take proceedings against the ship in Bombay for the amount of our claim, but as our purchase from you was cif Bombay there is, we think, no question that this is a matter for you to settle with the steamer and we confirm our telegram of yesterday to you as follows: 'Referring your letter dated 6th June we have submitted our claim 1020 pounds as per our letter of 22nd June. Our claim is against you. We have nothing to do with the steamer. We trust you will succeed in obtaining fair treatment from the owners as the captain seems to have behaved in an extraordinary manner in refusing to load in accordance with the recommendations of the marine surveyor and in terms of the charter party. Our Bombay friends advise us that the vessel arrived at Bombay yesterday afternoon.'" Then I wrote them that the attempt of the owners to dismiss the libel had not been successful, and that we put our claim forward to the steamship company.

Mr. Huffer: What is the full text of that?

A. "The attempt of the owners of this steamer to have our libel dismissed was unsuccessful, whereupon their lawyers suggested to our counsel that they thought it would be a good plan to discuss a

(Testimony of Wm. D. Wheelwright—Resumed.)

compromise. But we saw no reason why a suggestion of that kind should come from us, so we wrote the Tacoma agent of the Osaka Shosen Kaisha presenting our formal claim, in which was included the sum of 1025 pounds on your account, asking for a settlement, and pointing out that we had saved the company much more than the total amount of the two claims by means of extra dispatch in loading. We told him that, while we were naturally desirous of a prompt settlement, we would give him time to submit the matter to the home office of the company in Japan, which he said he would do. This was on the 5th inst. or thereabouts, and reply should reach here by the middle of November.

Court: What is the date of that letter, Mr. Wheelwright?

A. That was the 23rd of October, 1917. On the 28th of September I formulated the claim, this claim that we are suing for, put it up to Mr. Orrett: "We received a letter yesterday from our Bombay friends who purchased the cargo that went forward by the steamer above named ("Saigon Maru"), in which they state the amount of their claim to be as follows: Loss on 410 tons short shipped," etc. "\$4868.75", equivalent in exchange in dollars at the exchange of that date. "Our own loss and expenses amount to \$3898.05, making a total of \$8766.80. They say however that this does not represent their loss by any means, as the behavior of the captain resulted in their being deprived of the longer and more

(Testimony of Wm. D. Wheelwright—Resumed.)

valuable lengths, so that their loss is considerably more than the amount named. We are inclined to think however that they will accept the 1025 pounds in full settlement provided it is paid promptly. We haven't the least hesitancy in asking your company to pay the \$8766.80 in view of the amount that we were able to save them by giving the ship extra dispatch at this port—the lay-days in accordance with the charter party extended to the 11th June at 7 A. M., whereas the ship was finished on the 3rd of that month at 5 P. M. Taking the demurrage rate of \$2000 per day as the basis, you will see that the gain to the ship was \$15,000, less extra stevedoring of \$1030, making a net saving of \$13,970."

This is the last to them, January 15, 1918, to Gillanders: "Saigon Maru. We cannot at present writing see exactly eye to eye with you in the position that you take, but are quite sure that there will be no differences that won't be settled entirely to your satisfaction. But we hesitate to discuss the matter as frankly as we should like to do just now while our suit against that boat is pending. And we would remark with regard to this that we are dependent on the testimony that you can give us as to your loss to enable us to prosecute it. Therefore we hope our attorneys will soon receive an answer to the letter that they wrote you asking for the names of witnesses to whom interrogatories should be addressed," etc.

I want to explain with regard to that that I am

(Testimony of Wm. D. Wheelwright—Resumed.)

not a lawyer, I am simply a merchant, and I felt that our loss that their loss accrued by reason of the behavior of the captain, that the owners were responsible for it, but as to whether it should be collected by them or by us, or whether the fact of our not having paid them would have any bearing I didn't know until my lawyer said that we could not collect unless we had paid or assumed the liability. And I didn't want to discuss the matter freely and open the door for lawyers to tie me up in complications. And that is the reason why I said that I didn't like to write very freely about it while the case was in court.

Mr. Wood: Mr. Huffer, these that I offered have your marks on them, so perhaps you would like to use those, but we will just introduce these.

A. Now, I have here all of the letters from Gillanders.

Mr. Wood: When I offer these copies then, they are all copies, and formal objection is made, there is no objection, however, to the fact that these are copies.

Mr. Huffer: Oh, no, no.

A. All the letters are here if they would like them, and all the letter books are here if you want any more.

Marked "Libelant's Exhibit U".

(Testimony of Wm. D. Wheelwright—Resumed.)

RECROSS EXAMINATION.

Questions by Mr. Huffer:

Q. I call your attention, Mr. Wheelwright, in order that the court may have the whole matter before him, this letter appears in letter book on page 359, written by your company and sent to Gillanders, Arbuthnot & Co.?

A. Yes, sir.

Mr. Huffer: I will read this letter into the record.

A. Isn't that in, Mr. Huffer? I think it is in. "March 19, 1917. Messrs. Gillanders, Arbuthnot & Co., Calcutta, India. Dear Sirs: We wrote last on the 14th and referring to cables as per inclosed list we have to say that our asking that you approve the charter of the 'Saigon Maru' had no reference to the terms of the charter (which, of course, would be usual and according to the conditions of our sale to you) but only to the size and location of the steamer. Your answer is entirely satisfactory, on the understanding, of course, that the 3,300,000 board measure is an estimate. The quantity carried should be somewhere between three million and thirty-six hundred thousand according to the construction of the ship and the quantity of coal. The agent of the owners is still conferring with them by cable and assures us that we may expect a confirmation of the charter, on receipt of which we will advise you at once by wire."

(Testimony of Wm. D. Wheelwright—Resumed.)

Court: Was that letter written by the Pacific Export Lumber Company?

A. Yes, by the Pacific Export Lumber Company.

Mr. Wood: As a matter of fact, however, Mr. Wheelwright, you did close with Bombay before the charter was finally closed, did you not?

A. Oh, yes, we closed on the 17th.

Mr. Huffer: And omitting immaterial matter referring to other transactions: "While writing we called up Mr. Orrett, agent of the O. S. K. at Tacoma, and learn that he was then in the act of decoding a cable from Japan which he assured is a full confirmation of the charter of that steamer about which he expects to telegraph us later in the day, and just as soon as we hear from him we shall cable you the necessary information. He gives her date for laydays here as May 20, which is of course rather late for April-May clearance, which he said in the first place the steamer would make. It was his failure to give us the lay date and advice as to the location and prospective voyage of the steamer that moved us to state to you by cable all we knew on that point. In view of the remark in your last cable to the effect that you preferred delay rather than accept a larger quantity, we feel perfectly safe in going ahead. We can load the steamer in five or six days, so that May clearance will be certain if she arrives here on the 20th of that month as expected. She is of course liable to be delayed."

(Testimony of Wm. D. Wheelwright—Resumed.)

Mr. Wood: Might I inquire, Mr. Huffer, what you claim for that particular excerpt?

Mr. Huffer: What I want to get is all the circumstances surrounding the transaction, that they were advised, and it was considered by all the parties that the capacity of the steamer was merely estimated, and even by Mr. Wheelwright himself as low as three million.

A. I want to say here that this contract which was closed on the 17th of March, we did not confirm finally in writing till the 20th of March, because we were waiting to get this charter party fixed up and to see that the shipment would be made by this vessel. But on the 17th we had closed the business by this cable: "Your telegram to hand and we conform to contents. Expect to close 'Saigon Maru' ". But if we had not closed "Saigon Maru", we should have had to get another boat, and we had sold them the quantity that they mentioned in their cable of 5500 tons. There is something in this cable that I want to explain. There were two cables came in at the same time. We had asked them if they would accept the "Saigon Maru", and they telegraphed very positively that they would not accept her. My object in doing that was to try and fix it so that they would take the cargo by that vessel, whatever it was, in satisfaction of their order. But with that telegram before me, I cabled accepting the order, which of course was on their terms which did not

(Testimony of Wm. D. Wheelwright—Resumed.)

bind them to accept the "Saigon Maru". If we had lost her, we would have had to take another one.

Q. What was the last communication in the series that you claim closed the deal with Gillanders?

A. Calcutta, March 17, 1917, 5:30 P. M. "Your telegram to hand. We conform to contents. Expect close "Saigon Maru." Estimated 5500 loads or 3,300,000 feet."

Q. Now, with respect, Mr. Wheelwright, to the market value of lumber on the 2nd day of August, we of course are now speaking of the lumber that you would have put on top of the load of 241,599 feet that were already on deck. Now this other lumber that you are speaking about and giving the market value of is the lumber and the kind of lumber that you would have put on deck had the captain been willing to take it.

A. My testimony about the market value was not given with special reference to that 500,000 feet that he did not take. It was to the general market price of lumber, which would include that.

Q. Yes, that is what I thought, Mr. Wheelwright, but this controversy is about what, in your opinion, should have been put aboard and what was not put aboard. Now it is lumber of that character and grade and market value, as to the market value with which we are concerned in this case, and not the stuff that was already on the ship.

A. Oh, there would be no difference whatever,

(Testimony of Wm. D. Wheelwright—Resumed.)

Mr. Huffer—no difference whatever. You see, it is according to the list, "G" list, and it does not make any difference whether it was that shorter lumber that was on the ship or the longer lumber that did not go, it is all the same market price.

Q. I understood you to say yesterday that the longer lengths were more valuable in Portland as well as in Bombay.

A. No more than the difference; no more than the list difference. But I said there were cases where sometimes the more expensive lumber was more valuable even than that represented by the difference on the list. As for example, at the present time if you want to buy clear, you have to pay list difference and \$20 more.

Q. Now, how much were those on a basis of your \$20 list, which I understand is a "G" list, what was the market value of your long 12 x 12 that you intended to take?

A. You mean actual value, or list value, base value?

Q. No, I mean the actual market value in Portland.

A. When, on the 2nd of August?

Q. On the 2nd of August.

A. It would be, I should say, \$20 plus the differences according to "G" list, which could only be figured up.

Q. That is what I want to get at.

A. I cannot tell you. I would have to take

(Testimony of Wm. D. Wheelwright—Resumed.)

the schedule, draw that schedule of shortage off, and compare it with the list. But the actual value does not cut any figure, sir. It is the list value—the base value.

Q. Of course it may not, Mr. Wheelwright, in your opinion, but according to our theory it does cut considerable figure as to just what its market value was in Portland on that day in dollars, and not merely in terms of the "G" list.

A. As I tell you it might be arrived at if we can find out just what the shortage was. I think we could come pretty near it and then figure it out. But immediately you do that you throw it all out of gear, because this whole transaction was on the basis of "G" list.

Q. You are unable then, as I understand it, to state what was the market value at Portland, Oregon, on August 2, 1917, of the lumber that you intended to ship, but which was left behind, the average market value in dollars and cents.

A. Yes, I am unable to state it accurately. I can come very near with an estimate. I should think that 12 x 12 that they write about was worth \$3 to \$4 a thousand more than the list. I can come closer to that with time to see what the shortage was, and figure it out according to the "G" list. But my best judgment is that it would be \$3 to \$4 a thousand more than the list price, which would be \$23 to \$24.

Mr. Wood: Well, it might be more than that.

(Testimony of Wm. D. Wheelwright—Resumed.)

A. My conclusion is that \$20 is the fair market value of lumber at that time, the 2nd of August, in accordance with the list.

Q. But you were speaking of lumber generally, Mr. Wheelwright, when you said that.

A. Yes, but it doesn't make any difference. It all comes in Mr. Huffer, I cannot seem to make myself understood. That is the market price according to the list, and that schedule would be just as much more than \$20 as the actual price exceeds the list price, which I think would be \$3 to \$4.

Q. The great trouble about us is, Mr. Wheelwright, that I have one theory of the case and you have another. I think it is necessary to have the market price here in Portland in dollars and cents.

A. I have given it, sir, as close as I can, \$3 to \$4 extra, I think.

Q. Now, Mr. Wheelwright, referring to this statement, Libelant's Exhibit L, some of these matters I did not ask you about before, and did not make clear even to my own mind, because right on the spur of the moment I did not catch the full purport of them. Now, the first item on this Libelant's Exhibit L of 2,729,005 feet.

A. Yes.

Q. Where do you get that figure? I am just saying this—I don't know how it will operate when the full amount that was laden was 2,678,510.

(Testimony of Wm. D. Wheelwright—Resumed.)

A. I don't know. I am unaware of any such difference.

Q. You don't know how that comes?

A. I don't understand it, no, sir.

Q. And then following that, after 180 shillings, as I understand it, 180 shillings per load basis "G" list. Now, the "G" list basis is the \$20 basis.

A. I think so.

Q. And 180 shillings of course is 9 pounds sterling. Now you have a total c.i.f. Bombay there of £41971.11/8—is that shillings and pence?

A. That is 41,971 pounds 11 shillings and 8 pence.

Q. Yes, I see. Now 41,971 pounds 11 shillings 8 pence for that amount of lumber is at a greater rate than 180 shillings or 9 pounds?

A. Certainly. Certainly. A greater price to the extent of the difference according to "G" list.

Q. It amounts to practically 9 $\frac{1}{4}$ pounds sterling; just a little less than 9 $\frac{1}{4}$ pounds sterling. Now in the depositions of Mr. Clapham and Mr. Hunter they say they bought that at 9 pounds a ton.

A. Yes.

Q. Now, that makes a difference of $\frac{1}{4}$ pound sterling between your figures and theirs as to what your contract price was.

A. If they said they bought it at 9 pounds a ton they meant on the basis of "G" list, because that is what they did buy it on, basis of "G" list.

(Testimony of Wm. D. Wheelwright—Resumed.)

Their cables state that distinctly. I haven't seen their testimony, but I have their letter here closing the order.

Q. But they give that figure, and from that they have assessed their damages.

A. I cannot tell you anything about that.

Mr. Wood: You say it makes a difference of 40 pounds?

Mr. Huffer: $9\frac{1}{4}$ pounds sterling according to the "G" list, as Mr. Wheelwright has it listed here in this Libellant's exhibit.

Mr. Wood: Well, what is the total difference?

Mr. Huffer: The total difference on the lumber that was shipped is 1046 pounds sterling.

Mr. Wood: Oh, no, I mean the difference in their claim for damages.

Mr. Huffer: I have not figured that out. Of course it would make a difference, but how much I have not figured out yet.

Q. Now, if this lumber that was not shipped on that vessel, which you claim should have been shipped on it, had actually gone, had actually been carried to Bombay, then the cost of getting it there would have been proportionately the same as the cost of getting the lumber there that was shipped?

A. Yes.

Q. And on that you would have had to pay the same rate of freight?

A. Yes.

(Testimony of Wm. D. Wheelwright—Resumed.)

Q. The same insurance?

A. Well, rather more insurance.

Q. A little more insurance?

A. Because of its extra value. The same rate of freight, however.

Q. Do you know what that extra value is other than you have just stated—\$23 or \$24?

A. No. I think it would be \$3 or \$4 extra.

Q. And you have some other items of expense in getting that lumber to Bombay, "Less charter commission on freight" at 5%. Now what is the meaning of that?

A. Well, that is not a charge, as you will see, but a deduction.

Q. A deduction, is it?

A. Yes. The terms of the charter party were not 240 shillings net, but 240 shillings less 5.

Q. Yes, I see you are correct. I wanted to clarify my own mind.

A. I want to explain this difference. You see we sold 2,729,005 feet, and we only paid freight on 2,675,597 feet.

Q. Yes.

A. I see, however, that we paid the mill for 2,729,005 feet, and the difference is probably due to some dressed lumber, which is all sold according to the gross measure, but it is freighted according to the net measure, which is the size of the lumber after planing. That is the only way I can account for it, and that may not be correct.

(Testimony of Wm. D. Wheelwright—Resumed.)

Q. Now, all of the lumber that was shipped on that vessel was shipped in fulfillment of this contract with Gillanders, Arbuthnot & Co., was it?

A. Well, it was shipped on account of that contract. They don't accept it in fulfillment.

Q. Oh, I don't mean in that sense. I mean in pursuance of that contract.

A. It was shipped on that order, yes.

Q. And these are the bills of lading, that have already been marked for identification Claimant's Identifications "C, D and E," and those three bills of lading represent all of the lumber that went on that vessel?

A. To the best of my knowledge they do. But you see these two small lots are not included in the invoice. They were lots of creosoted ties that were sent over as samples and no account taken.

Q. In order that we may identify that, you referred there to the two bills of lading for the two small amounts, being Claimant's Identifications D and E?

A. One bill of lading for 938 feet and another one for 1875 feet of sleepers.

Q. You didn't have in there. This vessel was chartered and this lumber shipped merely for the purpose of fulfilling this contract with Gillanders, Arbuthnot & Co.?

A. That was the purpose, but we did ship these two little lots outside of the order as a sample, samples of creosoted sleepers.

(Testimony of Wm. D. Wheelwright—Resumed.)

Mr. Wood: They are for stowage, aren't they?

A. No, they were not for stowage.

Mr. Huffer: I offer these in evidence.

Marked "Claimant's Exhibits C, D and E."

Q. Just to clarify it in my own mind, in the first item you have rate of exchange pounds sterling \$4.68 $\frac{1}{2}$.

A. Yes, \$4.68 $\frac{1}{2}$ for the pound.

Q. As of what date was that?

A. Well, that was the day we sold our bill, and that was the rate we got for it.

Q. That was the day you sold your bill, and that was then about March, about the date of the charter party?

A. No, June 7th, the day the lumber was shipped.

Q. The day the lumber was shipped?

A. Yes. We couldn't sell the bill until we got the bill of lading of the lumber. We couldn't sell our bill on London until we got the papers.

Q. Oh, you mean your bill of exchange?

A. Yes.

Q. I see. That is the rate on your bill of exchange.

A. Yes.

Q. And it was on that basis that you drew your draft?

A. Yes, that is what we realized for the draft.

Court: You drew that draft and cashed it at the bank?

(Testimony of Wm. D. Wheelwright—Resumed.)

A. Yes.

Court: With bill of lading attached?

A. Bill of lading, insurance certificates, war risk certificates and invoices all attached.

Q. Then your rate of exchange below here under the head of ocean freight is \$4.695 $\frac{5}{8}$. As of what date was that calculated?

A. Well, that was the same time, but I think our bill was a ninety-day bill on London, and I think the freight was figured on the basis of a sixty-day bill. But that rate was arranged between the bank and Mr. Orrett and myself. We paid a little more for the freight money, you know, than we got for our own bill, and I think that was the reason for it. Is the charter party here?

Mr. Wood: Yes.

A. I might fix that if I could see it. No, the difference is not the difference between a ninety-day and a sixty-day bill. It is the difference between the buying and selling rate. You see the bank would charge \$4.695 $\frac{5}{8}$ for a bill where they would pay only \$4.681 $\frac{1}{2}$, and as this freight was supposed to go to London we had to pay the buying rate, which naturally was a little more—the banker's selling rate I mean, which naturally was a little more than their buying rate.

Q. Now, the Oregon pine is the same as Douglas fir, is it not?

A. Yes.

Mr. Huffer: I think that is all.

(Testimony of Wm. D. Wheelwright—Resumed.)

Mr. Hayden: Mr. Wheelwright, I just want to ask a question, if you please.

EXAMINATION BY MR. HAYDEN:

Q. This Inman-Poulsen Lumber Company is the concern that cuts your lumber for you?

A. We buy of them and also of other mills. They furnished that particular cargo.

Q. I mean this cargo you bought of them?

A. Yes.

Q. They cut it?

A. Yes.

Q. Where is their mill located?

A. It is on the east side, above the Hawthorne bridge.

Q. On the Willamette River?

A. Yes.

Q. Do they boom the logs down the river or are they boomed in the river?

A. They have their logs in the river.

Q. Have their logs in the river.

A. They bring them up.

Q. This lumber was to be cut then right out of those logs that came out of the river?

A. Yes.

Q. Probably would be the heaviest lumber then you would get, would it not?

A. At that season of the year it would not likely run very heavy, I should think. It does not go right absolutely aboard the ship from the saw,

(Testimony of Wm. D. Wheelwright—Resumed.)

you know. They pile it out in anticipation, and it dries more or less in the summer.

Q. How many days would they pile it out if they were cutting out this particular cargo?

A. They would get a million and a half ready before the ship got here. They would have a million and a half or two million feet ready some thirty days or more up to a week before.

Q. Well, what part were they going to cut for this ship, that the ship didn't take?

A. What part?

Q. Yes. Would they cut right up to the last?

A. Well, when the ship approaches completion, they look out and cut what she requires.

Q. That would be the long pieces then?

A. Well, I guess they thought the way we did, that if she fell short on her deck load, as the captain threatened to do from the start, that the long pieces would not go, so they did not cut them presumably.

Q. Do you know how long before this ship—this was the 7th of June, how long before the lumber was cut at the mill?

A. No, I cannot tell positively. I know when we give them an order like that they begin cutting right away.

Q. What was the date of the order you gave them?

A. On or about the 20th day of March.

Q. The 20th day of March. Now, I want to

(Testimony of Wm. D. Wheelwright—Resumed.)
call your attention to this letter which is dated the 5th of June, and that is written by your company, is it not?

A. Yes. That is a letter of mine.

Letter Marked "Claimant's Identification F."

Q. Now, I want to call your attention to this statement in the letter. "Her total cargo was 2,678,410, the dead weight of which was no more than 3946 tons."

A. Yes.

Q. That was the estimated weight then of that amount of lumber by you at that time? I notice you say "no more than."

A. And probably much less.

Q. Do you say that?

A. Yes.

Q. I didn't see that.

A. That is about one and a half, a little over one and a half tons.

Q. A little over one and a half tons makes how much a foot?

A. A little over three pounds to the foot.

Q. You figure 2200 pounds—2240 pounds, don't you?

A. No, we figure 2000 pounds here altogether.

Q. To the ton?

A. To the ton; American ton.

Q. When you ship it to London don't you figure dead weights?

A. We don't ever figure in weight generally

(Testimony of Wm. D. Wheelwright—Resumed.)

as a rule on lumber in shipping; but when we do figure we figure on the basis of American tons.

Q. All ships' weights are figured in long tons, aren't they?

A. When they are specified per ton of 2240 pounds, or per ton of 2000 pounds.

Q. No, I mean the registered weights are all figured in 2240 pounds?

A. I don't know what you mean by registered weights.

Q. The net tonnage and the gross tonnage.

A. I don't know anything about that.

Mr. Wood: Those are capacities

A. Those are capacities. The cubical tons more generally, 40 cubic feet, you know; not weight tons at all, as a rule.

Q. How much, Mr. Wheelwright, on the 26th of May had to be sawed for this cargo?

A. I don't know.

Q. I call your attention to your letter of May 26th. You say "A large portion of the cargo is ready, but the balance will have to be sawed, and in order that we may suit the quantity to what the steamer is going to carry, we will thank you to inform us after consulting the marine surveyor of approximate quantity of proposed deck load."

A. Yes, sir.

Q. You don't know, however, how much was sawed on the 26th of May?

A. No.

(Testimony of Wm. D. Wheelwright—Resumed.)

Court: To whom is that addressed?

Mr. Hayden: This is addressed to Captain Yamamoto by the Pacific Export Lumber Company, signed by Mr. Wheelwright. No, it is not signed by anybody, but it is marked "President" under it.

A. It is a copy you have, isn't it?

Q. No, I think it is the original. It may be a copy.

A. I guess it is a copy.

Mr. Huffer: Yes, it is a copy, because extra copies were sent.

Mr. Hayden: Oh, I see.

REDIRECT EXAMINATION.

Q. Mr. Wheelwright, you asked for the invoices to see whether there was dressed lumber on it so you could explain the difference in weight.

A. That explains the difference, Mr. Huffer, between the bill of lading and the invoice quantity. As you will see here, there was 196,354 feet of dressed lumber shipped, planed one side, tongued and grooved; and that is freighted according to the measurement after the planing, the tonguing and the grooving, and that accounts for the difference between the invoice quantity and the bill of lading quantity.

Q. It is freighted according to its dressed measurement?

A. Yes.

Q. But it is bought and paid for before planing?

(Testimony of Wm. D. Wheelwright—Resumed.)

A. Yes, that is the invariable rule both as regards buying and selling and freighting.

Mr. Huffer: That makes 2,675,597 as the actual contents.

A. Yes, sir, supposed to be.

Q. And the increased quantity there which you have noted, is the contents with the planed lumber counted as rough?

A. Yes, counted before it was planed. For instance, one by six is the size. Now, when planed that is about 13/16 by 5 1/8 or 5 1/4, and that will account for that difference.

EXAMINATION BY MR. HAYDEN:

Q. Mr. Wheelwright, when you are speaking about the dead weight of a ship—you have had considerable experience in chartering—isn't it a matter of fact that you have always considered the dead weight of a ship on the basis of a long ton?

A. Always.

Q. When you are speaking about cargo as going in a ship dead weight, her cargo going in the ship, don't you speak of it on the basis of a long ton?

A. Well, not necessarily, we don't in lumber. We figure on the pounds.

Q. How can you get dead weight as far as the ship is concerned without—

A. Dead weight doesn't often come up in lumber. We don't get them down to their marks, and we don't think much about it. But when we talk

(Testimony of Wm. D. Wheelwright—Resumed.)
of the dead weight in a ship, it means in terms of 2240 pounds. That is because they generally were English ships. They took English tons.

Q. They use that as a unit all the way through?

A. Yes.

Q. Yet do you mean to say in calculating the weight of this cargo you used the unit of 2000 instead of 2240?

A. Well, I don't know that we are in the habit of calculating the weight of a cargo.

Q. I say it is a letter I refer to.

A. That may have been in long tons, Mr. Hayden. I cannot tell now.

Q. It makes some difference in our calculations when we are figuring on the metacentric height, etc. I would like to know if you can remember how you figured it.

A. It is only an estimate anyhow.

Q. I understand.

A. 2240 pounds to the ton makes a ton and a half, you see, about 3360 pounds.

Q. A ton and a half?

A. A ton and a half would be about 3360 pounds to the thousand, and as I have said we figure between three thousand and thirty-five hundred pounds. You see that comes right in.

Q. Well, there is a whole lot of difference between 3000 and 3500 pounds when you get to talking about 6,000 tons.

A. Well, it never was weighed. There is no

(Testimony of Wm. D. Wheelwright—Resumed.)

getting at the weight. The matter of the weight is only an estimate.

Q. Yes. Well, the green lumber would probably weigh up in the neighborhood, coming out of the river, of 4 pounds, wouldn't it?

A. I don't think so at that season, no. The sap is all out of it. The water runs right off. I think a ton and a half per thousand is as near as you can get, a long ton and a half, 3360.

Q. A long ton and a half to the thousand?

A. Yes, as a full measurement.

EXAMINATION BY MR. WOOD:

Q. Are you speaking now of a long ton of 2240 pounds?

A. I mean 2240 pounds, that is a long ton. 2000 pounds make a short ton.

Q. Well, a long ton and a half, that would be—

A. 3360. 2240 plus one-half, 1120—3360 pounds.

EXAMINATION BY MR. HAYDEN:

Q. When you speak of the tons of coal in a ship, do you speak of them as 2000 or 2240?

A. Tons of what?

Q. When you speak of the tons of coal that go into a ship, do you speak of 2000 or 2240 pounds to the ton?

A. I don't remember now whether we pay for a short or a long ton in buying coal.

(Testimony of Wm. D. Wheelwright—Resumed.)

Q. I mean when you are figuring it in the dead weight of a ship, do you figure it as 2240?

A. Well, it is according to what we buy. If we buy 800 tons, short tons, we figure short tons.

Q. Do you figure a ship will go as far, when you are figuring distances she will carry, on a short ton as a long ton?

A. There is no occasion.

Q. I am just trying to get what you figure on; if you don't remember.

A. There is no need of answering that question, because it is perfectly palpable.

Q. Do you recall, when you figure tonnage of coal on a ship at 2240 what she will burn on 2000?

A. It is some time since we figured, we have manned our own ships, that is provided them with coal; I don't remember how we figured.

EXAMINATION BY MR. WOOD:

Q. I wish you would explain a little more fully, Mr. Wheelwright, the purported difference between 9 pounds per load at which this lumber was sold at Bombay and the $9\frac{1}{4}$ pounds which Mr. Huffer says this total amount figures out.

A. Because the 9 pounds was a base price, and the difference to make up this comes out of the extra values according to "G" list.

Q. That, I think, is exhibited on Libellant's Exhibit O, is it not?

A. Yes.

(Testimony of Wm. D. Wheelwright—Resumed.)

Q. Your bill to Gillanders?

A. Yes, it is all put out here at length. The extra values over "G" list were stated here.

Court: Aren't we taking up a good deal of time on this?

Mr. Wood: I think we are.

A. I think so.

Excused.

EDWIN ORRETT, called as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Hayden:

You remember, do you, Mr. Orrett, the circumstances surrounding the chartering of the "Saigon Maru"?

A. Yes.

Q. The question of which is involved in this case?

A. Yes.

Q. You were then in what position with the O. S. K.

A. Local manager at Tacoma of Osaka Shosen Kaisha.

Q. Now, letters have been introduced in evidence here. Will you please give your version of the chartering of the vessel, particularly with regard to the matter of the captain's discretion?

(Testimony of Edwin Orrett.)

A. It was some time in February, I believe, that Mr. Blodgett, whom I knew to be connected with the Pacific Export Lumber Company, came to Tacoma, and he called to see me, and at that time I had had some correspondence with the head office with a view to getting some business for our Bombay line, which they had at that time just recently started from Japan to Bombay, and they wanted to get cargo to feed it. I knew that the Pacific Export Lumber Company had been nibbling at Indian cargoes from correspondence that I had had before. So I said to Blodgett: "Do you think that you would be interested in chartering a ship to take a cargo of lumber to Bombay?" He said: "I think so, but," he says, "you better communicate with the office in Portland." So I got in communication with Mr. Wheelwright, sent him a telegram, and that started the negotiations, and it culminated in his offering us, that is, his making an offer that if we would get a boat that would load up to 4,500,000 feet, which was a large cargo, and would take a large boat, but not to exceed that, why he thought he could get some business. So things drifted along, and I was working one way, and I presume he was working the other, and we finally got together and made an offer of the Saigon Maru. The rate was arranged at 240 shillings and the other details were fixed, and I made it clear in my letter that the loading of the deck cargo was at the discretion of the ship's officers.

(Testimony of Edwin Orrett.)

Mr. Wood: Of course the letter is in evidence. That is the best evidence.

A. Yes, well Mr. Hayden asked me to make that clear. Now there is no doubt about that. But I will admit that I knew very little about chartering vessels. I have been connected as an agent for the steamship companies for quite a number of years—Pacific Mail and the O. S. K.—but I never had much to do with loading lumber, and I made that very clear in my letter to Mr. Wheelwright, and he was very kind in helping me along. I was trying hard to get business both for Portland and for our steamer. Then I found out that the form of charter which was sent up seemed to be all right, and I asked him to make up some charter parties in connection with that, because I had never made up a charter party, and I asked him to use our letters to get the facts. Well, the charter came back, and I looked it over, and I noticed that this particular thing about the ship's officers had been omitted. But I said: "Well, that is a detail, anyhow," because as far as I always understood it is always at the discretion of the captain as to what he shall load on the ship, so I never particularly questioned that; let it go through, and signed it, and that is the history of the charter party.

Q. Now, with regard to the sale, did you ever have any information, or state what general information you had with regard to that matter from

(Testimony of Edwin Orrett.)

Mr. Wheelwright or any of the Pacific Export Lumber Company's agents or employees?

A. No, I never knew whether the cargo had actually been sold to any particular firm or individual, or whether it was going on consignment, or anything about it. I only know this: That the ship was chartered, that a certain quantity of lumber was to be loaded on that ship, but the exact amount none of us knew at that time. It was up to 4,500,000 feet if the ship would take it.

Q. Did you ever hear from the Pacific Export Lumber Company that they had sold a definite amount of lumber in Bombay?

A. No.

Q. To any one?

A. Never.

Q. Did you ever have any experience with regard to the loading of deck cargoes of lumber on steamers?

A. No, never loaded a deck cargo of lumber, nor have since.

Q. What did you have to do with the loading of this vessel?

A. The actual physical loading of the vessel?

Q. Yes.

A. Nothing whatever.

Q. Only in connection with making arrangements for her loading, the charter party?

A. That was all, as agent for the company

(Testimony of Edwin Orrett.)

making arrangements for the space, getting the vessel on the berth, etc.

Q. Now, as agent of the company out here, your duties were primarily what?

A. Well, looking after the office and soliciting cargoes and freight generally, attending to the traffic, financial business.

Q. Did you have anything to do particularly with the captain on the method of loading vessels?

A. Well, agents always have a good deal to do with captains in loading vessels. They always have to coax them along.

Q. Yes, well, what I had in mind by that question was, do your powers and jurisdiction extend over the captains?

A. You mean could I give a captain an order?

Q. Yes.

A. Well, I don't think so. I never tried to, because I think he would disobey me because he would think he knew better than I would. We have tried to sometimes.

Q. There was a telegram, I think, introduced in evidence here by Mr. Wood, from San Francisco, Exhibit J, "Leave Thursday on Beaver. Advise captain will expect him to load up to the capacity as indicated by marine surveyor and approximately 750,000 feet on deck." Will you tell us what was meant by that telegram?

Mr. Wood: Well, now, that telegram speaks for itself I think.

(Testimony of Edwin Orrett.)

Court: That telegram speaks for itself.

Q. I don't mean that exactly. I mean the circumstances under which that telegram was sent and the purpose of it.

A. Well, when I put the boat on the berth, or rather before the boat got on the berth here, after she left Tacoma, I had gone to San Francisco. I came down the night before or the same day that the boat was expected here and saw Mr. Wheelwright, and also made arrangements I think with the stevedore as to the loading of the boat. And they both told me that a boat of that size, going by the dimensions, should carry anywhere from—oh, from 600,000 to a million feet on deck. I said that is an awful lot, because I had always been used to carrying very little on deck. But they said they always do that. Well, I said: "I suppose the surveyor knows." He said: "He is generally pretty well posted." Well, I said: "Of course it is up to the ship's officers as to what they will take, but if you think they can take that much, the more they take the more money we will get." I was looking after revenue. So I went down to San Francisco. While I was there I got one or two telegrams from the Pacific Export Lumber Company to the effect that the captain was refusing to take deck cargo except very little. And I might say here that when I was in Portland the captain of the "Saigon Maru" told me he did not think he could take any more than 175,000 feet on deck. I told him that was very

(Testimony of Edwin Orrett.)

small I thought; he better try and take all he possibly could. So when I got that telegram I was a little provoked, for the reason that I expected to make a showing on this ship. It was the first ship we had, and I personally had wanted to do the best I could to get the ship well loaded, not only for the sake of our good friend the Pacific Export Lumber Company, who were patrons and have always been very good to us, but also to get the revenue that I wanted for the steamer; and I will admit that I just shot that telegram off without thinking very much about it, or without knowing anything about it. I just simply sent it. That is all.

Q. Well, in your opinion is it fair to draw an inference from that telegram that it was your idea she should carry 750,000 feet on deck?

Objected to.

A. I had no idea what she could carry. I was simply guided by what the others had told me here. I just said to load up to that. In fact, I wanted to try and get as much on the ship as I could.

Q. But at the same time please your patron, as I understand it?

A. Please my patrons and get some money for the company. That is all true.

Mr. Wood: I want this evidence to be as broad as ours was, but what inference should be drawn from the telegram is decidedly for your Honor.

(Testimony of Edwin Orrett.)

Q. In concord with the request of the Pacific Export Lumber Company on this talk that you had with the Pacific Export Lumber Company, did you communicate with the Osaka Shosen Kaisha, the head office of the company, to see if you could make any arrangements whereby the captain would be ordered to take more deck load?

A. Yes. I came back from San Francisco the day before the ship had finished loading. After I found out that the stanchions had been cut off and that the deck load aft had been appreciably small, you know, compared with the deck load forward, that is why I asked the reason. Then the captain told me what he had told me in Tacoma, that he could not take any more on account of his fear of putting the ship in peril on account of endangering these steering rods. I thought that that perhaps was—oh, I don't know—I sent a cable anyhow to Osaka and asked them if they would not instruct the captain to carry as much deck cargo as would be recommended by the marine surveyor as being proper, as otherwise considerable amount of revenue would be lost to the company. That was the telegram I sent to them.

Q. Did you get an answer back?

A. They answered back and said that while they regretted the loss of revenue, the opinion of the captain must be final, which I anticipated I would receive, anyhow, but still I thought I would make the attempt to get it loaded if possible.

(Testimony of Edwin Orrett.)

Mr. Hayden: We will get those telegrams for you if you want them, Mr. Wood.

Mr. Wood: Yes, I would like to see them.

Recess until 2 P. M.

Portland, Oregon, December 17, 1919, 2 P. M.

EDWIN ORRETT resumes the stand.

CROSS-EXAMINATION.

Questions by Mr. Wood:

Mr. Orrett, I suppose that you negotiated with your principals in Japan about the charter before it was made, didn't you?

A. No. I asked them whether they would be able to provide a ship to carry up to and not exceeding 4,500,000 feet. You mean about the actual conditions of the charter, etc.?

Q. I mean that when you were negotiating with Mr. Wheelwright for the charter you were at the same time carrying on communications with your principals in Japan about it naturally?

A. Only for getting the ship. The making of the charter was between myself and Mr. Wheelwright.

Q. Yes, but I suppose you had to carry on cable correspondence with your principals about getting the ship?

A. Oh, surely, yes. Yes, that is true.

Q. Now, have you those cables with you?

A. I haven't got anything connected with the

(Testimony of Edwin Orrett.)

O. S. K. Company because I have not been connected with the O. S. K. Company for over two years. I have nothing to do with it.

Q. You ceased their employ when?

A. I think it was finally severed about the end of September, 1917.

Q. And all the records passed out of your possession at that time?

A. Certainly.

Mr. Wood: Have you those, Mr. Huffer or Mr. Hayden?

Mr. Hayden: No, I can't tell you anything about the correspondence. I never had seen it to this time at all.

Mr. Huffer: There is some correspondence here leading up to the signing of the charter party.

Mr. Wood: While Mr. Huffer is looking for it, this is the correspondence I want, whether by letter or cablegram: I want the correspondence between Mr. Orrett and his principals for getting the ship, before he made the charter with Mr. Wheelwright; and also I want the correspondence between him and his principals in regard to the claim made by the Pacific Export Lumber Company after the breach.

A. I had no correspondence regarding the claim because I didn't know anything about the claim. Mr. Wheelwright told me when I was sending that cable on the last day or the day before that there would be a claim put in, and that is why he was

(Testimony of Edwin Orrett.)

going to libel the steamer, and that is why I sent the cable and put that memorandum in the cable about possible claim. That is the first I had heard about any claim, and I have never seen any claim.

Q. After Mr. Wheelwright wrote you the letter that is in evidence here presenting the claim in figures, didn't you correspond with Osaka about that?

A. I don't think I ever saw that letter. What date is that letter that you refer to?

Q. I am sure you saw the letter. It is addressed to you.

A. It depends on the date of it. I have no recollection of seeing any claim. I may have seen it, but it is a long time ago.

Q. I refer, Mr. Orrett, to the letter dated September 28th, of which I show you a copy.

A. Well, it is possible that I saw this letter, but I have no recollection of it now, Mr. Wood; none whatever.

Q. And you don't know whether you communicated to Japan the contents of the letter?

A. I really couldn't say now, because I have no recollection of ever seeing it, and that is about the time that I was ruling out. But I can't remember anything about that particular letter.

Court: Was it handled in your office?

A. It would be handled in the office. Then about that time I severed my connection with the company.

(Testimony of Edwin Orrett.)

Mr. Hayden: If your Honor please, I cannot see the pertinency or relevancy of any communication between this office of the Osaka and the other office of the Osaka with regard to a claim after it has once been presented after the event. That is only a matter of history of whatever they may do with regard to the adjustment of it. It is a matter that has no relationship to the issues that are here; whether this ship was overloaded or underloaded or properly loaded is the issue this court is trying.

Court: The court has not the information these parties might have had regarding the claim.

Mr. Hayden: You mean simply the fact that they did submit a claim?

Court: Yes.

Mr. Hayden: We would acknowledge that they submitted a claim. That would end that inquiry as to what these letters were, wouldn't it?

Court: There is something back of all that that might affect this case, and that is the question as to what notice the ship had or the owners had of the purpose of purchasing this cargo of lumber, whether it was to fill a contract made by the Export Lumber Company or whether it was just an open purchase of the freight, without any indications to the ship owner as to the special purpose of the purchase being made.

Mr. Hayden: Well, then, nothing that transpired subsequent at least to the loading of the

(Testimony of Edwin Orrett.)

ship could have any relevancy whatever, so far as that is concerned, because knowledge of the sale to someone else under the law must take place before the contract is entered into to be material.

Court: I think that is very true, but this might throw some light on the question. I think your objection is probably well taken, but this record is being made up, and I will hear this a little further and see what comes of it. You may proceed.

Mr. Wood: I want to know from counsel—Mr. Orrett says he has not the letter—whether they have any correspondence from Mr. Orrett to his principals or from the principals to him in regard to this claim. If so, I want it produced. Now it will probably take Mr. Huffer some time to look through that. Shall I continue the examination.

Court: Yes, you may proceed.

Q. You say, Mr. Orrett, that you don't recollect this letter at all?

A. No, I don't recollect the letter at all.

Q. And you don't know whether you transmitted this claim to Japan or not?

A. If I received it I would send it to Japan, but I surely made no recommendation either for or against it. That I can safely swear. But as to having received that particular letter, I have no recollection of it. And I had no recollection of any claim having been presented to the company while I was connected as agent of the company in Tacoma.

Q. Can you safely swear that you never stated

(Testimony of Edwin Orrett.)

to the company that as a matter of fact the captain did sail away without a full deck load?

A. I would not say that. I might have expressed an opinion that he was criticised in Portland for not having taken a full deck load, and that is as far as I would go.

Q. There is no doubt he was criticised for that.

A. I know that Mr. Wheelwright and I talked about that before he left.

Q. But I want to know whether you ever stated to your principals that in your opinion the captain was to blame and did not take a full deck load?

A. No, I would not say that because they would know I knew nothing about it. They would take the captain's word naturally before mine, because he was a man of good judgment, cautious, and he had been connected with them a good deal longer than I had. So I think it would have been presumption on my part to have written such a letter.

Q. You don't think, then, that you ever gave them an opinion that the deck load was short?

A. Not as my own personal opinion. I might, as I said before, have notified them—I don't know. But that is as far as I would have gone, that he had been criticised in Portland for not having taken what was considered a full deck load.

Q. And you joined in that criticism of him, did you not?

(Testimony of Edwin Orrett.)

A. I did here, yes.

Q. In fact, you were quite aggravated that he did not take it?

A. Just as I said on the stand yesterday. I was provoked, because I was seeing a good deal of money being lost on account of what I thought was perhaps a wrong opinion or something of that kind. But as I said, I didn't know anything about it myself. I know nothing about loading lumber.

Q. And weren't you provoked with the captain for his action in sawing off those stanchions?

A. Well, I asked him why he sawed off the stanchions. He said it was because he was afraid of his steering gear. That put another thought in my head.

Q. As a matter of fact, you thought he was arbitrary and premature in sawing off those stanchions, did you not?

A. Before he explained his reason, on account of his steering gear. Then I could see that there was some argument for him.

Q. Yes, but you didn't quite answer my question. Didn't you think he was arbitrary and premature in that action?

A. When?

Q. When he sawed off those stanchions without even seeing how the lumber was going to be piled?

A. I didn't think so after I investigated, sir. After I investigated the matter and found out

(Testimony of Edwin Orrett.)

why he had done so I was not aggravated and I didn't think that he was arbitrary.

Q. Was that after you returned from San Francisco?

A. After I came back from San Francisco is the time when I saw the stanchions. When I went to San Francisco the ship was not here.

Q. Now, Captain Yano was the port captain, wasn't he?

A. Yes.

Q. And he was down here sort of supervising the loading of the cargo?

A. That is the idea.

Q. His deposition has been put in evidence here, I think.

A. Yes.

Q. Did he state to you at any time that in his opinion this captain was over-timid?

A. No, never.

Q. Did Captain Yano ever state that this deck load was not a complete deck load?

A. No, he said that it was quite enough.

Q. Just as he said in the deposition?

A. Exactly. In fact he was if anything more pronounced in his opinion as to the quantity of deck load that was carried being sufficient than was Captain Yamamoto. Captain Yamamoto hadn't as much to say about it as Captain Yano.

Q. Though neither of them had ever carried lumber deck load before, had they?

(Testimony of Edwin Orrett.)

A. Well, I don't know.

Q. You said that you always have to coax the captains along to load.

A. No, I didn't say always. I said that agents as a general thing have to coax the captains to take some cargo that they don't care to take; heavy weights and things of that kind. That is very well known in the shipping business.

Q. Well, is that peculiarly so of Japanese captains?

A. No.

Q. I think you said that this is the only lumber cargo you had ever loaded, and haven't loaded any since.

A. Quite correct; that is, full cargo. I have loaded partial cargo.

Q. That is, partial deck load when there is general cargo under deck?

A. Yes, a small quantity.

Q. Well, that is no comparison to this case.

A. Not at all.

Q. That probably throws light on the question I was going to ask you. You said in your direct examination that you were always used to carrying a little cargo on deck, and you had previously said you had never loaded a lumber cargo before. I take it now you mean by a little cargo on deck what you have just said, where you carried general cargo under deck you may put a small parcel of lumber on deck? That is what you mean?

(Testimony of Edwin Orrett.)

A. That is right. That is exactly the way we do.

Q. And in those cases the ship is generally loaded to her marks by the general cargo, isn't she?

A. Well, not necessarily.

Q. Well, not necessarily, but usually, isn't she?

A. I wouldn't say usually; latterly it is always usually because we have been taking so much heavy steel and iron. But before that, when we took cotton and case goods, they were not always loaded to their marks.

Q. Now, you were urgent in sending this cable to the Osaka asking them to telegraph the captain to take more deck load because you wanted to have the ship make a proper showing?

A. There were two reasons for that, Mr. Wood. The first reason was that I wanted the ship to make as much money as she possibly could; and the next was to accommodate the shippers to the best of my ability. I relied to a very great extent upon the knowledge of the shippers, and perhaps I was to some extent influenced by them, by my opinion as to their better knowledge.

Q. But you don't consider, do you, that the ship did make a proper showing on this voyage?

A. Well, I didn't at that time, but I have changed my opinion since, since the facts have come to my knowledge. As I testified yesterday, Mr. Wood, I didn't know anything about it.

Q. You sent the night letter saying that you

(Testimony of Edwin Orrett.)

thought she ought to take 750,000 feet on deck from San Francisco, didn't you, on May 31st?

A. Yes.

Q. Do you know when you got up to Portland from San Francisco?

A. I think it was about June 2nd to the best of my recollection.

Q. Is that the time that you at first thought the captain's action arbitrary in cutting off the stanchions, and then after talking with him changed your opinion?

A. Yes, that is the only time I saw the ship.

Court: Do you know whether that was shown to the captain of the ship?

A. I think that was addressed to Mr. Wheelwright, wasn't it?

Court: You don't know whether that was shown to the captain of the ship?

A. I presume it would be. I expect so.

Mr. Wood: As a matter of fact, the contents were communicated to him. I think perhaps Mr. Wheelwright had better testify to that, put it in the record.

Q. This cable that you sent to the Osaka asking them to instruct the captain to take a full deck load is dated June 2nd, isn't it, Mr. Orrett?

A. Yes, this is dated in Portland on June 2nd. That must be the date that I got here. I know Mr. Wheelwright and I went to the cable company's office and we blocked this out between us.

(Testimony of Edwin Orrett.)

Q. That was after you had talked to the captain, or not?

A. After we had come back from the ship.

Court: That was after you returned from San Francisco?

A. Yes, sir.

Q. And after you had visited the ship here in Portland and talked with the captain?

A. Yes, sir, and had a talk with the captain.

Q. That was after he had cut his stanchions off, wasn't it?

A. I found the stanchions cut off when I got here.

Mr. Wood: I will offer this cable in evidence.

Mr. Huffer: I think generally it is inadmissible on the ground it is immaterial. I don't think it has anything to do with the loading of this ship, the issue that is involved.

Objection overruled.

Marked "Libelant's Exhibit V."

Q. Now in this cable you say: "SS Saigon Maru. Survey has been held. Surveyors report 750,000 feet may go on deck with safety. Captain refuses more than 300,000 feet. Your loss will be about \$25,000 freight. Charterers damages are estimated to be about 5000 Bombay claims charterers will not clear unless a full and complete cargo of according to charter party loading stopped. Telegraph instructions direct to captain load deck load according surveyors' report. Telegraph me here."

(Testimony of Edwin Orrett.)

Now if, Mr. Orrett, you had talked with the captain and that talk had convinced you that the cutting off of the stanchions was a proper move on his part, why did you then come from the ship and send this cable?

A. Excuse me. I didn't say that I thought it was a proper move on his part. I said that it caused me to think that there might be something in what he said. But I had so much talk with the shipper, with the surveyor, etc., that I thought I would put it directly up to the owners of the ship, with whom I had got the ship, and as it were please Mr. Wheelwright. That was my idea. I wanted to show him that I was doing everything I personally could. I was as positive in my own mind when I sent that cablegram that they would return the answer that they did, but however, I sent it with the idea—I was a solicitor of freight—I had got to please my patrons naturally; I sent the cable to show that I was acting in as good faith as I could. Another thing, as I said, well if they want to take it, they want to instruct their captain, that is up to them. Now, that is all there is to it.

Q. But you wouldn't have sent it if you had not thought that the ship could safely take more?

A. I had nothing to do with it. I didn't know whether she would take much or little, Mr. Wood, because I didn't know. I was relying on what the other people had told me.

Q. Now, what led you to approach Mr. Blod-

(Testimony of Edwin Orrett.)

gett in Tacoma in the beginning with the inquiry as to whether the Pacific Export Lumber Company might like a ship for Bombay?

Mr. Hayden: Object to getting into all that. That has nothing to do with this. We have a charter party in evidence which requires us to load a full and complete cargo on ship. Now, going back into all of the discussion, how he happened to meet Mr. Blodgett in Tacoma, I think it is taking up too much time in this case. I don't see how it is material.

Court: I understand Mr. Blodgett is a representative of the Pacific Export Lumber Company?

Mr. Wood: Yes.

Court: The objection is overruled, on the same ground as heretofore, for the purpose of putting the court in possession of the condition at the time this charter party was entered into.

A. Because I had heard indirectly that the Pacific Export Lumber Company had been making some inquiries for Bombay and India ports from time to time and I was anxious to see if we could get some cargo to load for Bombay, as my principals had started a line from Japan to Bombay, and I thought it would be a good idea to get into the business if we could.

Q. Had you heard that the Pacific Export Lumber Company had sent cargoes to Bombay?

A. No.

Q. You didn't know whether they had or not?

(Testimony of Edwin Orrett.)

A. No.

Q. Now, when you telegraphed Mr. Wheelwright on March 7th asking him if there was any chance of his wanting a ship for Bombay he sent you this telegram which is in evidence, March 7th: "Answering your telegram this afternoon about Bombay we have to say that we have urgent inquiries from that port, as also from Calcutta, on which we shall be glad to make firm proposals on the basis of any reasonable rate of freight that you will name us." Now, didn't that indicate to you that he was chartering this vessel for a cargo that he had sold or was about to sell in Bombay?

A. Well, he had some business in mind. Of course I knew that. I know that people don't ship goods all over the world just for the sake of sending them there.

Q. They don't ship them unless they have sold them?

A. Sometimes they send them out on consignment.

Q. What do you mean by that?

A. They send them to somebody to sell.

Q. Is that what urgent inquiries from Bombay could mean?

A. I don't know. I paid no attention to that.

Q. You paid no attention to it?

A. Not at all. All I was interested in was getting a ship. I supposed he would have some object

(Testimony of Edwin Orrett.)

or else he would not want to send the lumber. That part of it did not make any difference to me.

Q. Now, then, following that telegram to you of March 7th he wrote you on March 9th as follows: "Referring to your telegram of the 7th about Bombay, we are this afternoon in receipt of a cable from our friends there renewing an offer that they made some time since for a full cargo of Oregon pine lumber for that port, quantity not to exceed 4,500,000 feet." And later in the letter he says: "Now as to the rate: The original offer came to us at a time when 200 shillings was being paid, but since then the THORDIS has been taken at 250 shillings, so that our buyers will have to come up materially in their views." Now what could that mean to you except that he had sold the cargo to go on this ship; and he inclosed a schedule of the cargo with the letter.

A. Yes, I realize all that. I realized that that was something that we had got to get a ship to carry, and that is all I knew. Now what I said yesterday was that I never knew anything about any definite sale or for any definite quantity. I repeat it.

Q. No, but you did know, didn't you—you might not know it was with Gillanders, Arbuthnot & Co., but you did know, in view of this letter and the other correspondence between you and the telephone talks you had with Mr. Wheelwright, that he

(Testimony of Edwin Orrett.)

was selling this cargo in Bombay and was getting the ship to carry it? Didn't you know that?

A. I knew he was getting the ship to carry the lumber, and that is all I paid any attention to, and that is all any other shipping agent would pay any attention to—to provide a ship to carry lumber at a certain price. As far as the sale of the goods, I suppose he sold it. I don't suppose he would give it away. He must have done something with it.

Court: I didn't understand you.

A. He must have sold it, I suppose, because he wouldn't be likely to give it away. But as far as what he did with the lumber, that was none of my concern. I was getting a ship to carry up to a certain amount of lumber so far as possible at a certain rate of freight; and that is all I understood that correspondence, and really all I cared for that correspondence as shipping agent.

Q. The fact that he had sold it was not a thing that interested you particularly then?

A. No; why should it?

Q. Well, I don't know as at that time it should.

A. No, that is the point.

Q. It has become important now, however.

A. There is the whole thing. Now that is all right. I am not trying to conceal anything.

Q. I know you are not, Mr. Orrett. I regard you as a very frank witness. I think, however, that you will agree with me that it is impossible to escape from the conclusion of this correspondence

(Testimony of Edwin Orrett.)

that you did know the cargo was sold in Bombay, though it may not have made any difference to you at the time.

A. Yes, I should say from reading that that there was an evidence of a sale.

Q. Now on your direct examination yesterday you said that you thought the captain's idea about the steering rod was, and then you broke off and you said: "Oh, I don't know," and I noted it here at the time, because I thought you hesitated to express your opinion about the captain's idea. If you did hesitate about it, I would like you now to say what you really thought about the captain's notion about the steering rods.

A. Well, I know so little about ships, but it seemed to me that at the time there was danger from the steering rods, as soon as he told me about it, but I didn't know enough about it to form a good honest-to-goodness opinion as to just what it was. That is the reason I broke off, I suppose, because it is not up to me to criticise a thing I don't understand at all.

REDIRECT EXAMINATION.

Q. You just said in effect, Mr. Orrett, that you presumed that those letters indicated that there was a buyer for this lumber. I understood you to say yesterday, and I simply want to find out if I am right about it—did you have any idea as to the quantity of lumber that was being sold? That is, for this particular voyage?

(Testimony of Edwin Orrett.)

A. The only amount of lumber that I ever heard was sold was as much as the ship could carry with safety, but not to exceed 4,500,000 feet, of that specification called "Adneci".

Q. Did you ever receive any indication from Mr. Wheelwright or anyone else that estimated this ship could carry 4,500,000 feet?

A. No.

Q. Or any other particular amount except after the difficulty arose?

A. After the boat got here then the estimate was made that it could carry something like—oh, I have forgotten just what it was—maybe three million to three million five hundred thousand; I don't know—as much as she would take. They estimated it, I think, at something like 3,300,000, wasn't it?

Q. There were two estimates.

A. The surveyor and Mr. Wheelwright.

Q. There was a letter introduced in evidence here yesterday in which Mr. Wheelwright estimated she would carry from 3,000,000 to 3,600,000.

A. Well, that was an estimate.

Q. That was not conveyed to your attention, was it, or was it conveyed to your attention while this ship was here, that estimate?

A. That that amount of lumber had been sold?

Q. No, that that amount was the estimate that this ship could carry.

A. No, because I was in San Francisco, and they told me when I came back, as near as I can

(Testimony of Edwin Orrett.)

remember, that that was the amount that had been estimated, and they hadn't got nearly that much on board.

Excused.

FRANCIS W. CULLUM, called as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Hayden:

Q. Captain, how old are you?

A. I am in my 49th year.

Q. Where were you born?

A. I was born just outside London, England.

Q. What have you been doing during your lifetime.

A. I have spent the whole of my life at sea from 15 years of age up to last year.

Q. Started to sea at 15?

A. 15 years of age, and I knocked off April of last year.

Q. What have you been doing since April of last year?

A. I have been assisting Captain Blain as surveyor, and as independent surveyor and owner's representative generally in the building of ships and repairing of ships; independent surveyor loading ship's cargoes.

(Testimony of Francis W. Cullum.)

Mr. Wood: Whom did you say you were assisting?

A. Captain J. F. Blain.

Q. And you are now and have been since you quit the sea located at Seattle, are you?

A. No, not all the time, sir. I have been in Seattle since April this year. Before that I was ten months in Tacoma with the Emergency Fleet Shipping Board, inspector of hull construction.

Q. You started to sea at 15 in what class of vessels?

A. I went to sea at age 15 in big sailing ships, East Indiamen.

Q. From what ports to what ports?

A. From Liverpool to Calcutta all the time; nowhere else.

Q. From Liverpool to Calcutta?

A. Yes, and back again to London.

Q. Taking what route?

A. Taking Cape of Good Hope, up the Bay of Bengal, same way home.

Q. How long did you continue going to sea in sailing vessels on that route?

A. I was about nine years, between eight and nine years on that route.

Q. That would make you 23 or 24?

A. Yes, about 23 I think it was.

Q. And when you left the sailing vessels what was your rating?

A. Master.

(Testimony of Francis W. Cullum.)

Q. And after leaving the sailing vessels what class of vessels did you go in?

A. I went into the Blue Funnel Line as junior officer, first class cargo, Blue Funnel of Liverpool, running out here to the Sound.

Q. The Blue Funnel line is known as what?

A. The Blue Funnel Line is known to be one of the best cargo lines, I might say, in the world; taking them all around best cargo ships—first class cargo ships.

Q. How many ships has that line now?

A. Well, I couldn't say exactly now, but just before I left the company, 12 months ago—just before the war they had 83; I think they have lost 20; I am not quite sure on that.

Q. Lost 20 during the war?

A. 20 or 22 during the war.

Q. What trade did you engage in while you were with the Blue Funnel people?

A. With the exception of six voyages, entirely to China and Japan and across the Pacific here; China and Japan mostly, with the exception of six voyages I went on the Australian trade. I ran six voyages down to Australia. The rest of the time I ran through China seas.

Q. And what other oceans?

A. Across the Pacific here for the last four years I was with them I ran across the Pacific here and down the China sea.

Court: To what ports?

(Testimony of Francis W. Cullum.)

A. Puget Sound ports, sir.

Q. You joined the Blue Funnel line as junior officer, you say?

A. Junior officer, third officer, yes.

Q. You took how long to work up to Captain?

A. Twelve years. The general average in that company—I was under the average in that company.

Q. Under the average in that company?

A. Yes.

Q. And how long have you been captain?

A. I was 11 years captain, sir.

Q. 11 years captain?

A. 11.

Q. After you got out of the sailing ship trade did you go down to Bombay and Calcutta?

A. No, I never went to Calcutta and never went to Bombay, but I have been around those waters, you know, because you have to pass by the Indian Ocean, same route. I haven't been any further north than Colombo. That is just around the corner, Ceylon, on the way to Bombay. I never got as far as Bombay.

Q. When you say you have passed those waters, going to what port?

A. Going to Britain from China.

Q. Then as I understand it, you took your ships from here through the China Sea?

A. Yes.

Q. And over this same route substantially up through the Suez Canal?

(Testimony of Francis W. Cullum.)

A. Goes together right across the Indian Ocean, Arabian Sea, Red Sea, Indian Ocean, up through the Mediterranean home.

Q. When you got home you would go back over the same route?

A. Same route again.

Q. How long was it you had been in that trade?

A. 22 years.

Q. 22 years with the exception of what?

A. With the exception of six voyages to Australia, which were made about, I suppose, six voyages, we do that in about 21½ years practically; a little over.

Q. Have you been through those waters during all the seasons of the year?

A. Yes, I think I have been in the China Sea every month of the year, and Indian Ocean.

Q. I wish you would tell the court the character or class of the vessels, that is the tonnage, that you have been sailing in after you joined the Alfred Holt steamers.

A. As master or officer?

Q. Officer and master.

A. I have been in them—the smallest I was in I think was 1200 tons and the largest I was in was 10,224 gross tonnage.

Q. Have these ships been of various depths and various breadths and lengths?

A. Oh, yes, all sizes, that size of ship, you know, and all depths; naturally that size of ship.

(Testimony of Francis W. Cullum.)

Q. From your knowledge and experience would you say there was any difference in the character of one ship from that of another, even though they may approximate the same apparent figures?

A. Do you mean in carrying capacity or their behavior, or what do you mean?

Q. I mean carrying capacity and their behavior.

A. In carrying capacity if they are sister ships there is very little difference in them, but in their behavior at sea there is.

Q. What do you mean by sister ships?

A. Sister ships, they are built of the same mold, built by the same builders, practically the same mold.

Q. Same ship, same mold?

A. Yes, he builds one ship, two ships, perhaps seven or eight ships, you see, off the same mold of ship, and they call those sister ships.

Q. Did you ever have any experience in that yourself?

A. Yes, in behavior of them I had two sister ships one entirely different from the other.

Q. What two ships were those?

A. I was master of the Steamship Ixion and also of the Steamship Talthibius. They were two sister ships built by the same people the same year. As soon as one was in the water the other went on the stocks—same stocks.

Q. What was the difference in those two ships so far as behavior was concerned?

(Testimony of Francis W. Cullum.)

A. I took them both across the Pacific here, and down the China Sea. The Ixion would go along with full cargo, what we call very fine sea-boat in bad weather. And the other one, she was what we call a very dirty ship. That means the water come right over her.

Q. In other words, the Ixion—

A. The Ixion was the better ship in that respect; but the two of them I don't think they carried—I don't think there was 10 tons in their lifting capacity difference between them.

Q. And the Talthibius was taking water?

A. She was a dirty ship to run.

Q. A dirty ship means there is lots of water on deck?

A. Lots of water comes over; water comes right in over her all the time in heavy weather.

Q. Yet these two ships were made off the same model, same specifications?

A. Well, if I was master of the ship and they were both alongside the wharf, and anybody came along and painted the name out, I would not know which was which; exactly the same.

Court: How do you account for that?

A. I cannot account for it, sir. I don't think anybody can. To look at them they are just the same, same mold and everything, and yet one is a wet ship and the other goes along apparently dry. I don't say one goes along with no water on her decks, but one is worse than the other.

(Testimony of Francis W. Cullum.)

Court: Same depth in the water?

A. Oh, yes, same depth; full loaded marks, the same, sir.

Q. Captain, how large a ship was the Ixion. What was her dead weight?

A. I don't know. I can't give you her dead weight. I can give you her gross tonnage. We go more on gross tonnage. I think the gross tonnage of the Talthibius was 10,220; I think the other was 10,222, if I am not mistaken, or 24.

Q. Two tons difference?

A. Two to three tons difference, that is all between the two ships.

Q. You were master of both of those ships?

A. I was master of both of those ships, yes.

Q. How long were you in the Ixion?

A. Nearly 12 months.

Q. How long were you in the Talthibius?

A. Three years, going on for three years.

Court: Did you load the ships the same?

A. Oh, yes. We ran across from Puget Sound to Hong Kong. We loaded them right down to their marks. I put them right down to their marks, sir, cargo and cargo. It doesn't say the other ship was dangerous, you know. One was dirtier than the other.

Court: Oh, I didn't understand.

A. What we call dirty is when they slop the water aboard more so than the other one.

(Testimony of Francis W. Cullum.)

Court: That would make a difference with the cargo on deck, would it?

A. Yes. I would rather carry cargo on deck, if I was doing that, on the *Ixion* than I would with the *Talthibius*. She would run better than the *Talthibius* would.

Mr. Wood: Did you carry deck cargo on either of them?

A. No, sir. They were not built for deck cargo.

Q. Did you make a comparison of the quantity of lumber stowed under deck as compared with the cubic capacity of the holds of some of these vessels that appear in the books of Mr. Wheelwright, and which he referred to as being ships of substantially the same size as the "*Saigon Maru*"?

A. Yes, I made an examination of those figures.

Q. And you made calculations from your examination, did you?

A. Yes, sir.

Q. The boats I refer to as I took them down were the *Sandhurst*.

A. Yes.

Q. The *Ilford*?

A. Yes.

Q. The *Albenga*?

A. Yes.

Q. The *Comeric*?

A. Yes.

Q. The *Volga*?

A. Yes.

(Testimony of Francis W. Cullum.)

Q. And the "Saigon Maru"?

A. Yes, I looked at all those ships, sir. That is, I looked at the figures.

Q. This is the result of your calculation, is it?

A. Yes, that is it, sir.

Mr. Hayden: I offer this in evidence.

Marked "Claimant's Exhibit G".

A. It is not my figures but a copy.

Q. You read them off to me.

A. Yes, I read them off to you and you put them down.

Mr. Hayden: Now, there are six ships here, your Honor, the ships run net tons as follows: Sandhurst 2768, Ilford 2789. The percentage of the under deck cargo to the cubic capacity of the Sandhurst, which is 31 tons less is .745 as against .862 for the Ilford. The Sandhurst is 2768 and the Albenga is 2769. As I said, the Sandhurst percentage is .745 and the Albenga percentage is .691. There is a difference there of one ton.

Mr. Wood: What does that mean? Percentage of what?

Mr. Hayden: The percentage of cargo carried under deck taken from the books of your company as compared with the cubic capacity of the whole, comparing that with the net tonnage for the purpose of showing the similarity of the vessels. The Comerich net tons is 2594; her percentage of under deck cargo is .729. The Volga is 2851, and her percentage of under deck cargo compared with her cubic

(Testimony of Francis W. Cullum.)

capacity is .764. The "Saigon Maru" is 2740 tons, and she is .689. The Albenga is 2769 tons and the "Saigon Maru" is 2740 tons, or a difference of 29 tons, and the Albenga carried .691 and the "Saigon Maru" carried .689. Those are the two that are nearest. The variation, if your Honor please, between those boats which have been cited here as most nearly analogous to the "Saigon Maru" is from .689 to .862.

Q. Now, Captain, did you compare the "Saigon Maru" and ascertain how her molded depth compared with the molded depth of the other vessels, any of the other vessels that have been mentioned here?

A. She is deeper than any of the other vessels of her size.

Q. In other words, her molded depth is greater than the molded depth of any other vessel of her size?

A. She is a deeper ship for her size.

Q. She is a deeper ship than any other ship that is mentioned here?

A. Yes, she is deeper than any ship we found in those books.

Court: How much?

A. It runs from—I think it was a foot and a half to I think it is six inches is the nearest ship to her, if I am not mistaken, sir. I would not say for certain on that. I think it runs from six inches—from one foot six to the nearest one to her is six

(Testimony of Francis W. Cullum.)

inches, as far as I recollect. I wouldn't be entirely sure of those figures. I am not far out I think. She was the deepest ship of the lot by six inches.

Q. Now, Captain, what forces do seafaring men take into consideration in determining the stability of a ship, which of course determines the amount of cargo and the placement of the cargo on board of her?

A. Force of gravity, I suppose, is one, and the metacentric height is the other one, sir. But in practical purposes as far as the ordinary shipmaster is concerned they go more for a practical way of finding that out, easier way of figuring in our estimation. Of course young men today go in more for the scientific way, but older men were not taught that in our young days. We went more on our own experience. We would test a ship with weights, all that sort of thing, more so than we did with figures.

Q. As a ship is immersed, what is the effect of that immersion on the question of stability? Is there buoyancy that plays on the ship?

A. Certainly. The further she goes down of course the bigger the pressure.

Q. Now, can you tell the court what you understand is meant by the center of gravity of a ship?

A. The center of gravity is the center of buoyancy, where all forces meet.

Q. That is the center of the weight, do you mean of the ship?

(Testimony of Francis W. Cullum.)

A. Center of the whole ship, all the ship, center right in, sir, cargo, ship and everything.

Q. And the center of buoyancy is what?

Mr. Wood: He just said the center of gravity was the center of buoyancy.

A. The center of gravity is—I know exactly what it is, but to explain it is a different matter.

Q. I see. Well, I didn't understand you. When you get the metacentric height, how do you work it out, on principle, I mean, if you know.

A. I never went into those figures at all, working out those metacentric heights. I was more in the practical line. I was of an older school than that.

Court: How do you define it?

Mr. Hayden: As I understand it, your Honor, the center of gravity—we will use this for illustration—is the point in the ship, if this were the ship, where the total weight of the ship centers. That is, there is a point where all the forces come together.

Court: If the ship were stationary?

Mr. Hayden: Yes, or whether it is stationary or not, it is a question of point of weight. If you took a cube of the same size length, breadth and thickness, and the same density, the center of gravity would be right in the middle of it. Now then, if you took that cube and hollowed out a part of the top of it, the center of gravity would be lowered. It would come down into the solid part more. In other words, the center of gravity is the center of the

(Testimony of Francis W. Cullum.)

weight of the article. Now, a solid like iron is heavier than water and of course will sink. A ship, which is hollow, even if it is made out of the same piece of iron which will sink, if you hollow that iron out, take the same quantity of iron and make it hollow, it will float, but there is exactly the same weight in the two pieces. Now, when you dip a piece of iron into a bucket of water, for instance, a solid piece of iron, it will displace a volume of water equal to its size. If you spread it out so that it floats, it will displace a volume of water equal to its weight. Water is figured about 35 cubic feet to the ton. Now, as this ship displaces, a ship made out of this solid block, as she displaces the water she is buoyed up by it of course, but the water is all around her; therefore she has displaced some water. The center of buoyancy is the center of the weight of that water that is displaced. In other words, you take the surface of the water and run it right straight through the ship—if you could project the line of the surface of the water through the ship down to the bottom of her and follow her sides up you would get the weight of the water which is pushing in on the ship or up on the ship, one way or the other. Water pushes exactly at right angles to the surface it is pushing against. So the bottom water is pushing up; the side water is pushing in. Now, the center of buoyancy is the center of the weight of that water that is pushing up. Gravity, of course, we know, is pushing down. Now, if the center of gravity is high and the

(Testimony of Francis W. Cullum.)

center of buoyancy is low the boat will stand upright, because the center of the weight is above the push up. You figure buoyancy as a push, like you were trying to shove it up. As you raise or lower the volume of the ship the center of gravity goes down, which is sinking the mass, the center of gravity goes down. But as you lower the ship in the water there is more height to the space that she has displaced; consequently your center of buoyancy goes up. And when your center of buoyancy gets up to your center of gravity it has got to turn over, no matter what it is. Buoyancy then has got force to push it over. Now, I don't know whether I have made that clear.

Court: Now the metacenter.

Mr. Hayden: The metacenter is this: Here is the center of gravity, which is the center of the weight of the boat, and the center of buoyancy, which is the center of displacement. When the boat is standing perpendicular those two lines of forces are on a perpendicular line. Now, so long as the center of buoyancy is a sufficient distance below the center of gravity you can swing that like a clock—like you would swing a pendulum. It will swing. The center of buoyancy never gets so that it will disturb it. But when you move the center of buoyancy off to one side, that pushes up as against the center of gravity, which always remains in the same place in the ship. The center of buoyancy moves, because the form of the water, the form of the hole is all

(Testimony of Francis W. Cullum.)

different you see. It is not symmetrical. You don't have the same symmetrical form to the water, that is, to the hole made in the water by the ship going down into it. So the center of buoyancy, as the ship may move from side to side, is always shifting. But your center of gravity always stays fixed on the ship after it is once loaded. Of course, we are talking about stationary or static conditions. Now, as this gets over this way, there is a lever created between these two. The center of gravity is pushing down and the center of buoyancy pushing up, and that creates what is called a lever. As the two get close together, that lever becomes longer. It is just like a fulcrum. You take a pivot and shove a piece of timber out, the further out it gets the more power it has to push your object over. Consequently the closer the center of buoyancy gets to the center of gravity on the ship that is moving in a seaway, the more danger there is of its going over. Now, to measure that angle, that leverage force, they take a line which is perpendicular with the center of gravity; otherwise runs right up and down through the center of gravity. And then the center of buoyancy, when it is stationary, is directly under that. As you move the center of buoyancy over, there is this line which is always stationary through the center of gravity, and then there is the angle which comes up from the center of buoyancy. See what I mean? Then this point up here where those two would hang is called the metacenter. That is called the metacenter

(Testimony of Francis W. Cullum.)

where these two forces meet each other. Now, then, as your center of gravity comes down and your center of buoyancy goes up this distance on this angle of course becomes less. So when you speak of the metacenter as being 1-36 as it is in this case, it means it is one foot and .36 inches above the center of gravity. It may be two feet above the center of gravity. When the ship is tilted these forces will play on each other from that sort of pendulum, as it were. Have I made it reasonably clear?

Court: I think I understand. I wanted to get the idea.

Mr. Hayden: Maybe if I had an illustration out of this book here. Just a moment. I can hand you that, I think, where there is shown a picture of it here. This is "Know Your Own Ship."

Court: Like "Every Man His Own Lawyer"?

Mr. Hayden: It is not, your Honor. This is an absolutely scientific book that is recognized in all the courts of the land.

Q. I was going to ask you, Captain, now what does your experience show, so far as stability of a narrow ship as compared with a broad ship, and a deep ship as compared with a shallow ship? Put it that way first, a deep ship as compared with a shallow ship.

A. A deep ship wants more ballast in the bottom of her, more dead weight in the bottom for homogeneous cargo. Is that what you mean?

Q. Yes.

(Testimony of Francis W. Cullum.)

A. If she had a homogeneous cargo in her, a deep ship has more tendency to flop over on her side, be too tender, cranky; therefore we have to put ballast in the bottom of those ships to carry a homogeneous cargo. In ordinary cargo we put the heaviest in the bottom, the lightest on top. We have to be more careful with a deeper ship than a shallow ship.

Q. That might be illustrated by a lath floating on the water. It is hard to make the lath float on edge.

A. Exactly. You have to put a heavier weight on it to keep it on its edge. Certainly, same thing.

Q. Then what would you say as to whether or not a deeper ship, with all things being equal, would carry as much cargo on deck as a shallow ship in proportion?

A. A homogeneous cargo you are talking about?

Q. When you speak of a homogeneous cargo, that is, lumber is a homogeneous cargo?

A. Yes, it is lumber cargo.

Q. You mean by homogeneous what, Captain?

A. All one kind of stuff, a cargo of cotton, or a cargo of lumber or a cargo of coal. Anything is a homogeneous cargo if it is all the same weight all the way up, not different weights.

Q. Speaking of lumber as a homogeneous cargo?

A. Yes.

Q. Would a deep ship in your experience carry as much on deck as a shallow ship proportionately?

A. She would carry as much on deck if she

(Testimony of Francis W. Cullum.)

would take more ballast down below. I would say either shingle ballast or water ballast, anything of that character; she would want more water ballast down below.

Q. If you can get enough of it—

A. If you can get enough of it she will carry just as much.

Q. If you can't get enough of it, then what?

A. Of course she won't carry as much.

Q. Captain, there were some remarks made here the other day by Captain Hoben and Captain McNaught, I think, also I think by Mr. Rothschild about a sag in the cargo. Now, what is a sag in the cargo?

A. Well, what we generally call a sag in a cargo—

Mr. Wood: I would like to interpose an objection here, your Honor? These men were talking about sags on a deck-load of lumber. It is all they were talking about. Captain Cullum has stated that he never carried a deck-load of lumber. I think that is correct, isn't it, Captain?

A. Quite correct.

Mr. Wood: You have never carried a deck-cargo of lumber in your life, have you?

A. No. That doesn't say I couldn't say what a sag is.

Mr. Wood: How could he describe what a sag in a deck-cargo of lumber is when he has never carried one in his life.

(Testimony of Francis W. Cullum.)

A. I think Mr. Hayden asked what the definition of a sag was, didn't he?

Court: The objection will be overruled.

Exception allowed.

A. A sag is when you load the cargo, no matter what cargo you load, the cargo has a certain swing on it; so has the ship. The ship sags and the cargo sags. When the cargo sags, say a cargo of lumber when they stow it it is impossible to get it face and face unless they have dressed lumber. When it is sawn lumber there are always a certain amount of spaces. When she has these sags, of course naturally it gets closer together when she comes back again. Say she was sagging all one way for some considerable time, that sag will come out of her when she goes the other way, but not all at once, because this wood is getting closer together. It will go over; it comes back, tapping it, it makes it tighter all the time.

Court: A sort of wrench?

A. Yes.

Q. How does that sag go with respect to the blow of the waves on the ship, or the roll of the ship? What direction does it take?

A. If she gets going that way, the sag goes that way.

Q. Goes in the same direction as the blow?

A. As the blow.

Q. Pushes it over?

(Testimony of Francis W. Cullum.)

A. Pushes it over, yes, the same way as the blow.

Q. So that if a ship is subjected to the blow on one side for her voyage—she is going say to Bombay.

A. Yes.

Q. And assuming for this question that she would be struck on her beam, her port beam going there, by the waves.

A. Yes.

Q. What would be the effect of that blow on the cargo?

A. Why, it would sag it to starboard.

Q. Sag it to starboard?

A. Yes.

Q. That would be the whole cargo that would move over that way then?

A. No, the whole cargo wouldn't move. The whole cargo would sag.

Q. The whole mass would sag over that way.

A. Yes. More so maybe on top than on bottom. The whole cargo doesn't shift. The whole cargo sags, yes.

Q. But the higher up it is the more sag it has?

A. Yes, the higher up it is, the more sag it has.

Mr. Wood: When you say the whole cargo, do you mean the under deck cargo also?

A. No, I mean the deck-load.

Mr. Wood: He says the whole cargo.

(Testimony of Francis W. Cullum.)

A. Well, in fact, take the whole cargo, under decks too.

Mr. Wood: Under decks, too?

A. Oh, yes. Not so much down below as up on top, because it has not as much leverage.

Q. Now, what is the distance from Portland to Nagasaki?

A. I think it is something like 4900 miles on the composite great-circle track.

Q. You mean by that what?

A. I mean that because the nearest distance you get from one place to another crossing the globe is to go along until you get all the powers at right angles, work a great-circle track out of it, we call it. Of course in the Pacific the Aleutian Islands are in the way. We would have to go above the Aleutian Islands. That doesn't pay us. We make this track—it is not a great-circle track—as near as possible to get to it, to the southward of the Aleutian Islands.

Q. That is why you call it a composite circle because it is not a true circle?

A. No.

Q. You don't go as far north as a true great-circle?

A. No.

Q. By that track the distance is 4900 miles?

A. 4900 miles, about.

Q. Now, what is the distance from Nagasaki to Bombay?

(Testimony of Francis W. Cullum.)

A. That is a bigger distance. If I am not mistaken I think this one is 4700 and this other is 4900.

Q. You gave me the figures—I will refer to them. 4900 you gave me as the distance across the Pacific from Portland to Nagasaki, and 5100—

A. I know there is about 200 miles difference. The biggest distance is from Nagasaki to Bombay. I worked it out for you, gave you the figures.

Q. There is about 200 miles difference?

A. Yes, 200 or 250 miles difference.

Q. A ship going from Portland to Bombay, if she coaled at Nagasaki, would she coal at the coaling port nearest the middle of the voyage?

A. Yes, if she coaled at Nagasaki that is the nearest to the middle of the voyage. That is as near the middle as you can possibly get—200 miles in 5000.

Q. So in making that trip across, if she had enough coal capacity to carry her to Nagasaki, and wanted to take coal for Bombay, would you say it was the proper thing from a seamanship, practical seamanship standpoint, to figure on coaling her at Nagasaki?

Mr. Wood: If she only wanted to stop once.

A. If she only wanted to stop once, yes. If I was master, that would depend entirely on whether the owners ordered me to go there. If my owners said to coal at Nagasaki, I would coal at Nagasaki.

Q. If you got orders from your owners to coal

(Testimony of Francis W. Cullum.)
at Nagasaki, that is where you would take your coal for?

A. Yes, if I didn't have to go anywhere else.

Q. Now, there has been some talk here, Captain—

Mr. Hayden: I don't see that it cuts much figure, your Honor. Mr. Wheelwright himself transmitted the orders to this ship to coal at Nagasaki, to the captain of the ship, and he didn't—there is no writing at least that he objected to any such procedure, and he has not testified that he did.

Mr. Wood: There is a letter there in which he urged Muroran.

Q. Now what is the condition at Muroran in the latter part of June as far as weather conditions are concerned?

A. It is fine weather, one of the finest seasons around there, with the exception it is continually foggy.

Q. And what is the character of the harbor, the entrance of the harbor of Muroran?

A. Why, it is a rather narrow entrance with a rock right in the middle of the passage which you have to go around.

Q. What is the percentage of fog there in June?

A. I should say about 73 or 75 per cent, if not more than that; about 75 per cent.

Q. About the first of July?

A. About the first of July it is 75 per cent. I

(Testimony of Francis W. Cullum.)

am not quite positive. I think so. It is foggy practically every day there.

Q. Is there any danger of delaying the ship there?

A. You get inside of Muroran, you don't see anything, no man looking after a ship would venture in there; he would stay out there till it gets clear, till he finds out where he is. All sailors do that. They want to find something before they venture into a narrow place, see something a couple of miles distant, anyway a mile.

Q. Captain, what do you say is a reasonable margin of safety in coal for a voyage across the Pacific from Portland to Nagasaki on a vessel?

A. Ordinary cargo vessel?

Q. Yes.

A. I should say 25 per cent.

Q. 25 per cent?

A. Yes.

Court: What does that mean?

A. 25 per cent more than you would need. You work your distance out on the days you are going to take; take that and give her 25 per cent more on board; one fourth more I am quite sure.

Q. Now, a vessel that is a low power vessel, would that change that percentage at all, increase it or decrease it?

A. A lower power steamer, ordinary cargo aboard, I should say 25 to 27 per cent is ample in the summer months going across there; but if I was

(Testimony of Francis W. Cullum.)

in a big power boat I would not take so much. I would not take so much in a big power boat.

Q. In other words, the character of the weather would have something to do with it?

A. Well, if you get in a gale of wind with a big ship, heavy ship with big power on her, it takes a lot more to bring her down than it does in a lower power ship, naturally, the build of your ship.

Q. You heard me trying to illustrate a principle the other day, did you, that if two ships were running up stream, for instance, one could go six knots and the other could go twelve, the six-knot ship would lose the whole of her headway, while the twelve-knot ship would only lose half?

A. Yes, I heard you.

Q. That is right, isn't it?

A. Oh, yes, up a stream, yes.

Q. And the action of the elements is somewhat of the same principle?

A. Somewhat the same, but I would not say it is the same.

Q. It is not probably quite so extensive?

A. Not so extensive, no. The other is just at sea, one working gainst the other, there is the force of the stream dead water; but the other you have the weight of the elements; and another thing, it depends on the shape and make of the ship. If you have a big heavy ship, a fast ship, she is built with finer lines. If she hits anything she will go through it. With blunt lines she stops dead; she has to get

(Testimony of Francis W. Cullum.)

momentum on her before she goes ahead. The sharp liner does not lose momentum at all; she is going all the time. If she does lose it, she picks it up again.

Q. This last vesesl you had was how much speed?

A. 14 knots.

Q. Have you noticed that phenomenon or condition as you have gone to sea?

A. Oh, yes. I have had the old-fashioned boat, the old ten-knotters, get your smoke at sea; they stop dead; it takes a couple of minutes to get the momentum on them again. That is the way they lost their speed.

Q. You have passed them at sea, haven't you, when they were practically standing still and you were going right along?

A. Oh, yes; go ahead, take no notice of them.

Q. You have heard this testimony, captain, about these steering rods and the stanchions?

A. Yes, I have heard all about them finally.

Q. You are familiar with that class of arrangement of steering rods on ships, are you?

A. I never sailed on it, sir.

Q. But I say you have seen them, are familiar with the arrangement?

A. Oh, yes, I have seen them very often. That used to be very common at one time.

Q. That was the arrangement in the old ships?

A. In the old ships, yes.

(Testimony of **Francis W. Cullum.**)

Q. Now, there has been some talk here about shifting in a storm, in case the steering rod on the ship should become jammed or broken, about shifting from the steam steering gear over to the hand steering gear.

A. Yes.

Q. I am talking about a storm, now, Captain. In a storm.

A. In a gale of wind, yes.

Q. What is your idea about that, how it could be done, and whether it could be done rapidly; how long it would take, would it be dangerous.

A. It could be done. It would depend entirely whether the thing was carried away, for one thing. It could be done. It could be done in a calm under way quicker than it could be done in a gale of wind. In a gale of wind the ship is blowing, twisting around. Say for instance, the chain is broke, not the rod—the chain will break as a rule before the rod, I should say; that is, rolling around—the ship is rolling around. Generally men look after themselves; they won't do it so quick. Men are not going to fly around when they see a chain rolling around, or if one side carried away. What the captain would do, I dare say, what I would do, I would put my helm right hard over; have them put your rudder over, jam your rudder over.

Mr. Wood: Just what Captain Genereaux said. isn't it?

A. I think he did say that.

(Testimony of Francis W. Cullum.)

Q. Suppose the lumber moves up against these stanchions, blocks it so you cannot put it hard over to one side and hold it.

A. If she was jammed, it would be harder I think to put her in hand steering gear than it would if they were broke. I would rather have a thing broke altogether than jammed, I think.

Mr. Wood: You mean jammed by the lumber or jammed by yourself with the use of the wheel?

A. You cannot jam it yourself by use of the wheel, sir.

Mr. Wood: I thought you said if one side carried away you would use the good side.

A. What I mean by jammed is bringing it hard over. He is talking about rods being jammed by use of lumber so you cannot use your steering gear one way or the other. I say I would rather have it broke, because the other side has no weight on it; you can pull it right across.

Q. Now, Captain, what are the stormy seasons or the dangerous seasons in the China Sea? During what months do they occur?

A. Typhoons in the China Sea occur from May, June, July, August, September. Sometimes I think you get them in October; very seldom. Of course the middle month is the worst. The end of July always to September, I think all people think it is the worst.

Q. These hydrographic charts, are they published by the United States Government?

(Testimony of Francis W. Cullum.)

A. Yes. They are excellent charts, and very, very true; far and away the best in the world; not the slightest doubt. The United States government pays more attention to this, spends more money on it, than all the other governments together. An excellent job I think. Men of all nationalities take these charts.

Mr. Hayden: I just want to introduce these charts in evidence. This is a pilot chart of the North Pacific Ocean in June, 1917.

Marked "Claimant's Exhibit H".

Mr. Wood: I suppose the charts are admissible as showing distances, direction of the wind, and so on, but I see all kinds of statements printed on them, and those I think are not admissible. I object to them. No opportunity to cross examine on the subject of their statements, whatever they are.

Mr. Hayden: This is a pilot chart for the North Pacific Ocean for July, 1919.

Marked "Claimant's Exhibit I".

Mr. Wood: They issue those for every month of the year, don't they?

Mr. Hayden: They issue them for every month of the year, but there is an accumulation of information here of weather conditions that have prevailed and it is marked on here for a number of years previous, so that the mariner may get an idea of what he may expect.

Mr. Wood: I think if any of these charts are ad-

(Testimony of Francis W. Cullum.)

missible they ought to be the charts for June, July and August, 1917.

Mr. Hayden: I have one here for August, 1917. I don't see that that has anything to do with it though; that is the North Pacific.

Court: There is no question here but what the captain of this vessel pursued the proper route?

Mr. Hayden: No, your Honor, that is not the purpose. I am going to show by these charts, as explained by Captain Cullum and from the data on them, what kind of weather might be anticipated on the voyage that this ship was starting out on; and the rule of law is that a ship must be loaded so that she is seaworthy and to encounter the kind of weather that may be expected on the voyage in question. Captain Cullum may give his information about his own personal experiences, and I also want to introduce the experience as shown by these charts compiled by the United States Government. Now I offer chart of July, 1918, Pilot Chart of the Indian Ocean.

Marked "Claimant's Exhibit J".

Mr. Hayden: And also the chart for August, 1917, Pilot Chart of the Indian Ocean.

Marked "Claimant's Exhibit K".

Mr. Wood: I object to them as far as the statements printed on them are concerned. I think the data from which the statements are made up of the officers who made them would have to be cross-examined to ascertain their value. Of course, as to the

(Testimony of Francis W. Cullum.)

distances and direction of the wind, and so on, I think that is different.

Court: Those maps are authoritative. I presume that ought to go in. The objection is overruled.

Q. I thought we had one—that is the one you couldn't get, that Pilot Chart for 1917.

A. I couldn't get for 1917. They didn't have it in stock.

Mr. Hayden: Then I will offer this pilot chart July, 1919, Pilot Chart of North Pacific Ocean, which contains in these red-line marks down here at the left hand of it cyclones that have happened during the month of July, and the years in which they happened are noted here, and they happened from 1907 up to 1915, is the last that I see on here recorded.

Marked "Claimant's Exhibit I-L".

Court: How are those made up?

Mr. Hayden: They are made up from information that is collected from United States observatories all over the world. They are printed at Washington, D. C., compiled under the Naval Department of the United States.

Mr. Wood: I think that sort of thing ought to be testified to before they become admissible.

Court: It would take a long time to work that out. I will overrule the objection.

Mr. Hayden: At the bottom of it it says: "Prepared from data furnished by the Hydrographic Office of the Navy Department and by the Weather

(Testimony of Francis W. Cullum.)

Bureau of the Department of Agriculture (Legislative Act June 17, 1910). Published at the Hydrographic office under the authority of the Secretary of the Navy, Washington, D. C.

Q. I understood you to say, Captain, that these charts are recognized by seafaring men all over the world.

A. Yes, they are recognized by seafaring men all over the world. They are absolutely the best.

Q. You rely on the data that is printed on them?

A. Yes. They are absolutely the best in the world. As I say, the United States Government spends as much money as all the rest of the governments in the world put together on those things.

Q. Captain, in sailing from Nagasaki to Bombay, leaving Nagasaki in the fore part, say July 4th, was it—July 4th, in a vessel for Bombay, India, and arriving there August 2nd, will you state the kind of winds that are to be reasonably expected to be encountered on that voyage, the kind of weather?

A. Well, when you leave Nagasaki, fine weather and moderate breezes, it is variable that time of year, because it is what they call changing the monsoon; you get variable winds all down the China, with the exception of course if you happen to get in one of these typhoons that come along periodically. They come along with change of monsoon season. You come down to Singapore, if you don't get a typhoon you get fine weather down to Singapore, Straits of Malacca, till you get to the northern end

(Testimony of Francis W. Cullum.)

of Sumatra, then you open out to the Indian Ocean, and just as you open at the Indian Ocean you get the southwest monsoon coming right across the Indian Ocean coming up southwest direction. Of course you have to go and steer due west coming across there I think from Sumatra to the southern end of India, get due west course, very near anyway, and the wind southwest does not say it is coming from the southwest exactly—it varies a point, a point and a half, sometimes it might vary two points.

Court: What is the distance from Singapore to Bombay?

A. That depends on the speed of the ship, sir. Oh, you mean the distance.

Court: Yes.

A. It is hard to say. 2000 miles, I think, sir.

Mr. Wood: It may be of interest to your Honor to know that this voyage took sixteen days. From Singapore to Bombay this ship took sixteen days.

Court: It took two days less than a month from Nagasaki to Singapore.

Mr. Hayden: That is right, as I understand it.

Mr. Wood: From Nagasaki to Singapore it took 14 days.

Mr. Hayden: Nagasaki to Bombay was two days less than a month; arrived in Bombay the second day of August.

Court: 14 days in the China Sea and 16 days in the Indian Ocean.

A. In the Indian Ocean.

(Testimony of Francis W. Cullum.)

Q. I refer now, Captain, to chart entitled "Tracks for Full-Powered Steam Vessels." It is Claimant's Exhibit No. 1, Yamamoto. Now, just show us where Singapore is, please.

A. Singapore is here (pointing on map).

Q. And you come up through the straits?

A. You come down through the China Sea, you enter the Straits of Malacca, go through Singapore Strait and enter the Straits of Malacca; you go up here in a northwest direction, go up to Achin Head, that is the north point of Sumatra, up to there it is practically fine weather; all fine weather in here. You open up here, come up Achin Head, then you get southwest monsoon coming over here, southwest direction, west southwest; and the steamer has to go from there right across here to Dondra Head.

Mr. Wood: About due west.

A. About due west course. Come right about here to Dondra Head. When she gets to Dondra Head, it is the south part of Ceylon, of course you have to haul up to the narrows, bring your ship around like this, and come up on the coast of India right up to Bombay. I think Bombay is here somewhere—come up here.

Q. Now, which direction is your coming up along the coast of India from Dondra Head?

A. Turn around Dondra Head gradually until you come up, coming gradually.

Q. Now, then, when you come to the northward

(Testimony of Francis W. Cullum.)

and go up from Dondra Head to Bombay, how does the sea strike the ship?

A. About right abeam.

Q. And as you are coming across to Dondra Head from Achin Head how does the sea strike the ship?

A. Strikes about four points on the bow.

Q. Four points on the bow. Is that nearly abeam?

A. No, abeam is eight points. Abeam is 80 to 90 degrees. Strikes you on an angle of 45 or perhaps less.

Q. Now, when you get out from Achin Head, up to the time you get up to Bombay you have the flow of the waves on one side of the ship?

A. Port side all the time, yes.

Q. Now, Captain, will you kindly give your experiences as to the kind of seas encountered during the monsoon season in July and August making that trip from Achin Head up to Bombay?

A. Achin Head to Bombay. From Achin Head across here.

Mr. Wood: That is Ceylon?

A. Yes. You get nasty weather across there. The wind is not so very strong, but nasty seas—thirty-five or thirty-six, thirty-five miles an hour at the outside; but the seas are big, what we call hollow seas, rolling sea, rather short. And in fact when we are coming across here going home to Great Britain, instead of going right across here we come down here,

(Testimony of Francis W. Cullum.)

and come up this way, in that season of the year, to get away from that sea.

Q. That is, the big ships do?

A. The big ships. I have been on the southern route up, up to 7000 tons. We come outside of Achin Head, we come down on west southwest course, we come down about ten north, then run along ten north till we get gradually bearing northwest to do away with that big sea. Not to say that the ships would not stand the sea, but to save damage to cargoes and bring our cargoes in in good condition, we prefer to run 200 miles north.

Mr. Wood: How much longer does that take?

A. About 200 miles, you know.

Mr. Wood: That is steamers you are talking about?

A. 200 miles farther that course would take you, the southern route, to what the direct route would have been.

Mr. Wood: And in time?

A. In time about, well, I say we run along on those finer boats anything from 285 to 290 miles a day.

Q. Captain, you told me something about meeting a boat, a large boat here starting across and you went to the southward on the route that you have described. She had to go in and get coal somewhere bucking those seas. Do you recall that?

A. Across here, sir.

Q. Wasn't it across there where you said you

(Testimony of Francis W. Cullum.)

had passed a fellow in here somewhere who tried to come across over to the canal——

A. No, no.

Q. You sailed down southerly; southerly through these waters and got out of the effect of the monsoons, and he went across in the monsoon?

A. No, he went across here. I don't know whether it was for coal. He went across here. He was going across in a faster boat than we, more powerful boat in every way. He said he was going to buck into it. I said I was going south. He was going faster than I was and I got inside of the Red Sea up here before he did.

Q. In other words, you went 200 miles in a slower boat and beat him?

A. Yes.

Q. His delay was on account of the seas?

A. What we call bucking the seas, making a direct course of it. That was in the end of July, if I am not mistaken.

Q. Now, Captain, you have described this circle down around to the southward of Ceylon to get out of those seas.

A. Yes, to get out of those seas.

Q. That is when you are making a voyage to Europe?

A. Yes.

Q. You were not going to Bombay then?

A. No; couldn't do it going to Bombay. You

(Testimony of Francis W. Cullum.)

have to go through it going to Bombay. You couldn't make the southern course on that.

Q. If you had come down the southern course going to Bombay you would just have that much more of the beam seas going up along to the northward, wouldn't you?

A. Well, it would be impracticable to run on the south to Bombay. It would put him over here in the neighborhood of Africa. He couldn't do that in a ship going to Bombay. I am keeping that not because it is dangerous—I don't want the court to think it is dangerous; we go down there to deliver better cargo for our customers and consignees generally.

Mr. Wood: You also carry passengers on those boats, don't you?

A. Yes.

Q. So you go down, make that circle, get out of that sea so it does not break up your cargo going through it?

A. It does not damage our cargo; turn out better cargo generally and make a better trip. If you don't make a better trip you make it just as good without giving your ship so much battering about, and your cargo generally. The more battering your ship gets the worse you turn your cargo in.

Q. Will you describe the character of the monsoon?

A. The monsoon is a wind that blows about $4\frac{1}{2}$ or 5 months of the year, blows strong for 4 months.

(Testimony of Francis W. Cullum.)

When I say strong, it blows about 5 or 6; then with heavy squalls it will go up to about 8, in heavy squalls and thick rain, rain during the southwest moonsoon, misty rain and dirty weather, as we call it, I should say about, I wouldn't put it beyond 40 per cent of the time it is raining and squally; always squally; you see squalls come around about every four hours, sometimes quicker than that, according to the moonsoons. Some years the monsoons are much stronger than others.

Q. As a matter of fact, before you go off into those waters, when those monsoons are changing or coming on, you make inquiry, don't you, to find out whether they are strong moonsoons or otherwise?

A. Oh, yes. A strong moonsoon comes in with the blast of a gun. It only varies about 2 or 3 days for years and years, when the moonsoon bursts, we inquire going out of the straits, meet another ship coming in, we ask what is the moonsoon like, has the moonsoon burst yet. When we leave port we have no information of it at all. It goes out like the shot of a gun; very rarely year after year more than five days when that moonsoon bursts.

Mr. Wood: When does it burst?

A. It bursts I think it is about the 25th of May is what the statistics show; but it might vary two or three days each side, but very rarely more than a week.

Q. Going up the coast of India to Bombay, on

(Testimony of Francis W. Cullum.)

a voyage like the "Saigon Maru" took, does the land have any effect on the waves by reason of this long run in from the southward?

A. Well, I have been only up there in the southwest moonsoon as far as Colombo, personal experience; but of course I read about it, hear about it from all the different ways. We all inquire about it. I have only been as far as Colombo. When you get down to land there, the water naturally piles up, you have the whole Indian Ocean bringing this swell up on the shore.

Mr. Wood: This is argument. Mr. Hayden can argue this as well as the witness.

A. I have been up as far as Ceylon, Colombo, I mean.

Mr. Wood: But you have never been at the place you are now describing.

A. No.

Q. You have been up as far as Colombo. That is part way to Bombay, isn't it?

A. Yes, on the way to Bombay.

Q. What is the effect of the piling up of this sea on the coast there?

A. It makes a bigger sea. It makes a bigger, hollower sea.

Mr. Wood: Wait a minute. The court has not ruled on this objection.

A. Colombo is on the northwest corner of Ceylon, sir.

Mr. Wood: It is before you make that turn up?

(Testimony of Francis W. Cullum.)

A. No, sir. Excuse me. It is after you make the turn up. Here is Colombo here. Here is Dondra Head. From Dondra Head to Colombo is about 180 miles.

Mr. Wood: You are describing this place where the water piles up as up here.

A. It piles up here in Colombo, too. You cannot approach Colombo hardly.

Mr. Wood: All right. If you are describing a condition of which you have experience, I have no objection, but you cannot describe a place you have never been.

Court: I don't think it is necessary to enter into minor details about the southwest wind there.

Mr. Hayden: Captain Hoben said they had nice summer seas down there in that season of the year. It was summer time, a lot of other things that went in for Libellant's case. I want to put on experienced men to show exactly what the situation is.

Court: Yes, but you don't need to go into much detail.

Q. In those seas, Captain, assuming a ship were going down there with a deck load of lumber, a ship the size of the "Saigon Maru," would those seas, after you got out into the monsoons, would they be breaking over the lumber?

A. Well, I doubt if the seas would come along and hit the lumber, you know. The spray would go all over it certainly. I don't say the seas would

(Testimony of Francis W. Cullum.)

go over it. If it hit the lumber the spray would go over it, yes. The sea would hit the lumber on the side. I dare say there would be squalls come along that the sea would go over her, but not all the time.

Mr. Wood: Not as a frequent thing?

A. Well, have heavy weather across there, as I say, moonsoons vary, nobody can tell what they are until they burst. One year is a moderate monsoon, another year is a very bad year for moonsoons. Nobody can tell till they burst; not even the hydrographic.

Q. Going down through the China Sea on this same voyage, you said that you had nice calm fine weather unless you happened to run into one of these typhoons that they speak about.

A. That is what I said, sir.

Q. Are you acquainted with a work on cyclones and typhoons by the Rev. Hosea Algui of Manila?

A. No, sir, I cannot say I know his works, but I know the man by reputation. He is superintendent of the observatory at Manila, I think.

Q. The Manila Observatory; don't give the name of it here.

A. Yes, superintendent there for the Jesuits, I think.

Q. Now, this gentleman in his work gives a table of the frequency of cyclones in July of various years, and I will read this table and ask you

(Testimony of Francis W. Cullum.)

whether or not that seems to conform to your own experience and if not you may indicate differently.

Mr. Wood: Just a moment before he reads it, your Honor. I object to it as not sufficiently proved. Even Captain Cullum does not know the man. If Captain Cullum wants to state his experience, his experience is all right—be glad to have it; but I don't think this book ought to be read to Captain Cullum, and then ask him if that coincides with his experience. It is very leading indeed.

Court: I think the captain better tell his own experience.

Q. All right, Captain, if you will just describe your own experience with regard to cyclonic weather in those waters we have just been talking about.

A. Do you mean in the months of July, August and September, or any time, sir?

Q. One cyclone is like another if it is a cyclone, isn't it? I assume the court will take the authorities, or at least take judicial notice of the authorities on what creates a cyclone—typhoon and cyclone are the same thing. I think probably the court knows the general principles.

Court: I suppose the principles are the same.

A. The principle of cyclone, cyclone and typhoon, they are all the same, only in different parts of the world they have different names.

Court: Have you been in a cyclone in those waters?

(Testimony of Francis W. Cullum.)

A. Yes, sir.

Court: Did you ever lose a ship in a cyclone?

A. No, I never lost a ship in my lifetime, thank God.

Court: Ever lose any tonnage in a cyclone?

A. Do you mean cargo tonnage, sir?

Court: Yes.

A. No, I have never lost any cargo tonnage, sir.

Q. Have you ever known of any other ship that was lost in a cyclone?

A. Yes, I have known several ships that were lost in cyclones. I say several—I know two, my personal friends were aboard of them.

Q. Have you ever seen a ship going out in company with you, and you both were in the same typhoon and ocean, the ship that went out got in the same typhoon you did, she did not turn up and you did?

A. Yes, I know that.

Court: I suppose a typhoon is like a cyclone. Take the cyclone in some of the western states, not very long ago a town was totally destroyed by a cyclone; it took houses on one side of the street and left houses on the other side of the street.

Mr. Hayden: Yes, I think that is small compared with what the typhoons are, though, in area. The big storm that the court probably read about down at Galveston, down in that section about a month ago, would be really a typical typhoon.

(Testimony of Francis W. Cullum.)

There was a big Spanish passenger ship caught out in it, and I think three or four hundred lives were lost when she went down in it. And the papers were full of wrecks at Galveston of the ships that came ashore there.

Court: I think I can get about as good an idea of the nature of a typhoon by reading up on it a little, without putting all this in evidence.

Mr. Hayden: If your Honor please, I think so too, but there are two or three or four experiences I want this witness to tell the court, personal experiences, and if you don't object to listening to those experiences, I think they would aid the court.

Court: Well, make it in a short way. We are getting along slowly.

Q. Captain, I want to call your attention to a typhoon that you mentioned to me east of the Philippine Islands from Yokohama to Macassar. Now, will you just tell the court your experience in that typhoon.

A. That typhoon, coming down from Yokohama to Macassar, taking east of the Philippines route, the nearest route to go down, I got caught in a typhoon there. I could not run. I had to face it.

Q. What do you mean by could not run?

A. I had the Philippine Islands on my lee.

Q. In other words, there was no chance for you to get out of it?

A. No, there was no chance for me to get out of it. If I went out of it I would go on shore, so I

(Testimony of Francis W. Cullum.)

had to go right into it, run the risk of loss of tonnage across the front of it.

Q. You had to run across it?

A. I had to run across the front of it. It is a thing you don't do, if you have any room to run at all, you are going to run, before you run across the face of it. I ran across the face of it. By good luck I got across the face of it before the center came on me. I hove my ship to; then I was all right. That was because I could not run away without endangering my ship's getting right on the rocks altogether on the Philippines.

Q. The day before did you meet any vessel?

A. Yes, the day before I met my old ship that I had command of two voyages before that.

Q. What was the name of her?

A. Ching Wo. At that time she was under the Japanese flag. My company sold her to the Japanese. I met her; she was on her way up from Java. I was bound down to Macassar, and then down to Java, so we were going the same route. She passed quite closely, within half a mile. When I got down to Java—got into Macassar, the authorities came aboard there, asked me a lot of questions, if I had seen this ship. I said yes I saw her the day before the typhoon struck me. I saw her in the morning. We were in the typhoon about early the following morning. I told them I saw her. They asked me all about her, what she looked like. Practically all right—I didn't see the ship was in

(Testimony of Francis W. Cullum.)

any danger; broken up or anything. The ship never turned up from that day to this. She went down in that typhoon. She encountered the same thing I did, and I dare say failed.

Q. A low-powered ship would have difficulty in getting across the face of a typhoon under those circumstances?

A. It depends on how far the typhoon is off you, you know. I don't think there is any regular statistics to tell you how far the typhoon really is off you. It means really more your experience and watching your barometer more than anything.

Court: Do you have notice of them some time ahead?

A. Oh, yes, you have notice of them sometimes 24 hours ahead.

Court: That enables you to get away and get out of them?

A. If you have the room, sir.

Q. Can you always get out of the way?

A. In that case I couldn't, you see. I hadn't the room.

Q. You were in those same waters?

A. I am talking about this same typhoon east of the Philippines. I couldn't get out of the way because if I did I would run onto the Philippines, jam me right up.

Q. Substantially the same waters the "Saigon Maru" went through?

A. No, the "Saigon Maru" went down on the

(Testimony of Francis W. Cullum.)

west side of the Philippines, sir. I was on the east side of them.

Q. You were on the other side?

A. Yes.

Q. The same thing would apply had it occurred up on the west side; she would have been up on the west coast of China?

A. Not when she would go—she couldn't get on the coast of China. The China Sea, there is rocks, shoals all around it. Really the coast is right down never very far off shoals and rocks and islands outside of the mainland at all.

Court: Are those typhoons as frequent along the coast of China as they are over toward the Philippines?

A. Well, yes. They don't go along the coast of China. Typhoons make up eastward of the Philippines, and they travel in a westward, west-northwest direction right across the China Sea, and then follow on up the coast.

Court: On this route the "Saigon" took the typhoons are not so frequent as over on the other coast?

A. Oh, yes, they are just as frequent, sir, because they make up on that coast, and they travel right across the China Sea. No typhoons make up on the China coast. They make up on the east of the Philippines and travel right across the China Sea in a west-northwest direction.

Court: Do they lose force as they go?

(Testimony of Francis W. Cullum.)

A. No, sir, they increase their force, increase their force and increase their area.

Q. Now, Captain, there is another instance that you spoke about, and that was in Hong Kong harbor in 1906.

A. Yes. That is the heaviest typhoon ever been known on the China coast for many, many years. I was in that. That was in Hong Kong harbor.

Q. What happened in that harbor?

A. Well, I think we were the only deep-water ship that came out in one piece.

Q. How many ships were in there?

A. The harbor was full of ships of all kinds. I say ships—boats and ships; we call ships deep-water ships; anything up to about a dozen of them in there, more than that, deep-water ships. Any amount of coasters.

Q. What happened to them?

A. They all went ashore. There were six sunk, breaking away from their mooring chains, colliding with each other. There were six right around us broke their anchor chains, going with the winds in the harbor, collided with each other and sunk.

Court: That was an exceptional storm?

A. The biggest storm known in Hong Kong for many years.

Court: Similar to that down at Galveston?

A. Yes, exceptionally big storm, wiped out the whole harbor that day; practically 100,000 people drowned that day.

(Testimony of Francis W. Cullum.)

Q. You went out to sea that day, did you?

A. No; yes; we went out to sea that afternoon to meet another one, yes.

Q. Then what happened?

A. We went out to meet another one. Another one came along. I was chief officer at that time. The captain would not take the risk of staying in the harbor any longer. He anchored. Went out and met the other one next morning.

Q. Two cyclones, one right after the other?

A. Yes, suppose one followed right after the other.

Q. You said something about an experience with a cable reel on that second one.

A. Yes, we went out there on that second one. Of course there was the first one came in the day before. There was only a matter of 36 hours between these two typhoons. And the captain would not, did not care about risking his ship inside of the harbor again, so he said we would go to sea. So we went out, and that night or next morning about two o'clock a typhoon struck us. We were going along, towards morning we got to southward of it. Then the captain thought he would turn around, just stop her, heave her to, get the best he could out of it. When he was heaving her to, she came to apparently all right, dived into it, tremendous sea on—she was diving right into it. All at once one of the seas came right up. She dived up it, filled her right up fore and aft. When

(Testimony of Francis W. Cullum.)

the seas cleared away you could see what happened. We encountered the towing lines, the reel came right up on the forecastle deck. That is a reel with steel cable, five-inch steel cable, 100 fathom five-inch steel cable, around this reel we kept it. That was placed on the forecastle head.

Q. How was it placed there?

A. Two standards for the reel, put the drum through, wind it up, and on the foot of this there is about three inches of teak wood; then that is on the teak wood deck, and underneath the teak wood deck is a steel deck. You see the bolts went right through the whole of that right onto the the steel deck; secured it with steel bolts. There were four of those securing that thing down. It took that reel, hit it, and knocked the bolts right out.

Court: I don't think it is necessary to go into that.

Mr. Hayden: The accusation has been made in this case, your Honor, that the captain of this boat was a timid man, he was frightened to take deck load. Now, my theory of this case is that "Fools rush in where angels fear to tread," as it were. This man was going down through seas where they have these typhoons year after year in the month of June more or less severe.

Court: That may be all admitted, and yet I think the court has knowledge enough about those seas without going into specific instances.

Mr. Hayden: All right.

(Testimony of Francis W. Cullum.)

Q. Now, Captain, you have been through several other typhoons, have you not?

A. Yes, I have been in five or six typhoons.

Q. And what would you say as a practical man as to the effect of the winds and seas on a deck load should a ship encounter one of those typhoons?

A. The deck load would not do her any good. I would rather be without a deck load if I was on her.

Q. Would it do her any harm?

A. Well, if she got one of those big seas in these typhoons, got on top of the sea, either the deck load has got to go, or else she has got to go on her beam-ends with it; ship big seas.

Q. Would that happen if she didn't have a deck load, in your opinion?

A. Oh, no, I don't think it would happen if she didn't have a deck load of course. Of course it depends where she is going. If she goes right in the middle of a typhoon, very severe typhoon, very few ships can stand it. Very few come out of the typhoons, the center of it, that I know of.

Court: What proportion of those typhoons can be substantially avoided by prior knowledge which you get of its approach?

A. Well, it depends on the place you are in in China, if you are going down the China Sea where the typhoon strikes you——

Court: I know. But I am asking generally what percentage of those can you avoid practically.

(Testimony of Francis W. Cullum.)

A. Oh, you can avoid three-fourths of them, sir, I suppose.

Court: And then let me ask you what percentage of the other one-fourth can you run so as not to encounter the severest point of the storm?

A. In the center, you mean?

Court: Yes.

A. In all my experience I have never known any one to get in the center and come out.

Court: A vessel would not live long in the center?

A. I don't think so. I haven't seen anyone that has been in the center.

Court: That ever came out, you mean?

A. That has ever come out, sir.

Q. Is there a peculiarity of typhoon seas over the seas that ordinarily run with steady breeze?

A. Yes, considerable difference. It is a sea that raises up, pyramidical sea as they call it in the book; lifts right up, the barometer is that low, the atmosphere is light; seas rise right up; they haven't got much force, like the north Atlantic—north Pacific sea, coming along rolling with a big heavy weight behind it. It just lifts right up and shoots——

Mr. Wood: Is that in the center?

A. No, a typhoon sea generally, sir. Of course the nearer you get in the center the bigger it is, but it hasn't got the roll of a big ocean sea. It just rises up in a heap like and falls over. There

(Testimony of Francis W. Cullum.)

is no pressure, the atmosphere is thin, the barometer goes down below 28. The atmosphere is very thin. That causes the sea to rise right up like that. Of course the wind helps a little.

Q. Captain, what is the effect of a large deck load of lumber forward and a small deck load of lumber aft with regard to holding the ship up into the sea, if she has to stop her propeller?

A. If she has to stop her propeller, sir?

Q. Yes.

A. Oh, she would not sail any sea at all, sir.

Q. How would she drift?

A. She would fall right off, I should think, until she gets the wind on the quarter if the propeller stopped.

Q. What is the effect when the wind is on the quarter and the ship is in a big storm, heavy seas running?

A. She rolls pretty severely. I think she would roll, maximum seas are coming along the way the ship is built; seas come aboard—come aboard from aft like. Your engine room and everything else, they are more or less fitted for the sea right ahead. Where you heave your ship to, your doors and all that generally open out, as we say. I might say a ship would fall in the same way if she had no deck load at all if the propeller would stop.

Q. What would be the likelihood of the ship off in that direction, of the sea striking the rudder and damaging that?

(Testimony of Francis W. Cullum.)

A. She would be in a bigger danger of the sea striking the rudder and damaging it than she would if standing up by the sea. What I mean by standing up by the sea is bringing her head to sea.

Q. The stability of a ship is determined, of course, by the distribution of the weights, and if the weights are up high above the water the ship is less stable, is it not?

A. Yes. Yes, if she is tender, of course; lift her higher up, make her tender of course she is less stable.

Q. It has been contended here, if I understand Mr. Wood's position, that if there was less coal taken on deck in this instance there might have been more lumber put on deck. Now, is it better on a voyage across the Pacific to put coal on deck, which is consumed or partly consumed during the voyage, than it is to put lumber on deck, as regards the stability of the ship?

A. Oh, as far as the stability of the ship, it is better to put the coal, because if you burn the coal off she is going to get stiffer; that is if she is tender, as the coal goes down she gets stiffer.

Q. If she has lumber on deck instead of coal, you burn the balance of the coal out from underneath that lumber, what is the condition as to stiffness?

A. She gets less stiff.

Q. Gets less stiff?

(Testimony of Francis W. Cullum.)

A. Certainly if you take it away from underneath.

Q. So if you put extra deck load on instead of coal, as you progress on your voyage the ship will become less stiff? Deck load of lumber, I mean.

A. Yes, she will become less stiff if you burn all your coal. Excuse me, say that question again, please.

Q. I say, if you put an extra weight of lumber on the deck of the ship and burn the coal out from underneath it, then the ship becomes less stable.

A. Less stable, sure.

Q. What would be the condition if you started out with 500 tons of lumber on deck instead of 500 tons of coal on deck, you are consuming the coal, or part of the coal, as you go across, taking the coal out from underneath, so that the coal goes down and the lumber stays on deck.

A. Oh, well, she would become less stable as you burned your coal off the top deck, if you have lumber on deck of course she is bound to become less stable. That would depend on how much coal is left down below. It depends on how much you burn out down below. Your coal, of course, is down below.

Q. I don't think you quite understood the question. Assuming that you substitute 500 tons of lumber on deck for 500 tons of coal on deck?

A. Yes.

Q. You have the same quantity of coal in the

(Testimony of Francis W. Cullum.)

bunkers on both occasions. The ship starts out and goes over to China and Japan?

A. She gets less stable again, more so I should say because you have less coal left in the hold, if you have any coal left at all.

Q. In other words, she would get less stable all the time?

A. Yes, sir she would get less stable.

Q. Assuming you don't put that 500 tons of lumber, you put 500 tons of coal on deck instead of lumber, and have the same quantity of coal under deck, you pass the coal down from the deck as you burn the coal out under deck, how is her condition becoming?

A. That means to say, you have 500 tons less lumber on deck and 500 tons of coal in the place of it, is that what you mean?

Q. Yes, that is what I mean.

A. 500 tons less lumber. It makes her more stable; makes her stiffer, sir.

Q. Makes her stiffer as it goes down?

A. Yes.

Mr. Wood: Stiffer as the voyage progresses?

A. As the voyage progresses, yes. I don't say she is stiffer as she left the port, you know. She would not be, because coal is heavier than wood. As her voyage progresses, of course she gets stiffer.

Q. Captain, you made up from the books that were handed you, did you—the books I refer to are the Pacific Export Lumber Company's books, a list

(Testimony of Francis W. Cullum.)

of steamers with their under-deck cargo and their on deck cargo, and got the percentage of the on deck cargo to the percentage of the under-deck cargo?

A. Yes, I made that out, sir. Those are my figures.

Mr. Hayden: I offer this in evidence.

Marked "Claimant's Exhibit M."

Q. There has also been some talk here about substituting, if the tanks ran down in this ship, fresh water tanks ran down, by reason of the water being used——

A. You mean they become empty like or partly empty?

Q. Yes.

A. Yes.

Q. Assuming that the water for the boiler is taken from No. 3, what would be the effect of putting salt water into that to run it up?

A. Into No. 3 tank?

Q. Yes.

A. Well, that is his feed tank?

Q. Yes.

A. He couldn't do that.

Q. Why?

A. He would have to feed salt water to his boiler then. He would not get across at all.

Q. You say he would not get across at all?

A. Unless he was towed across, because he would have to feed salt water in his boilers.

(Testimony of Francis W. Cullum.)

Q. No. 3 tank is fed from the other tanks, is it not? As you use water out of No. 3 tank, you take water out of these other fresh water tanks in reserve?

A. Yes. You take water out of other tanks into No. 3, because that is the only one that has a feed pipe connected with the boilers. The others have feed pipe to the deck, wherever you want it, but No. 3 tank is the only one has a feed pipe into the boiler.

Q. If you put salt water into one of those other tanks and try to carry it into tank No. 3, you will have the same condition substantially that you would have if you put salt water directly into No. 3?

A. Oh, certainly.

Q. So is it a practical thing from a navigating standpoint to fill up your fresh water tanks with salt water?

A. No, no; don't fill fresh water tanks with salt water if we can possibly avoid it.

Q. It is only done in cases of the greatest emergency, is it?

A. Oh, yes, I would do that in case to save my ship, I would not hesitate a moment, to save part of my ship or anybody's property in my charge, I certainly would do that, fill my tanks up.

Q. But if you filled up any of the other fresh water tanks but No. 3, and then had to use any salt

(Testimony of Francis W. Cullum.)

water, you could not run your engines, could you, your boilers would foam on you, wouldn't they?

A. Yes, they would if she had no condenser or evaporator on board to condense the water and put that into the boiler. But you cannot put salt water into any of these fresh water boilers at any time. I am not an engineer, but as a seafaring man I understand that. He must have fresh water for his boilers.

Q. Do you know whether the "Saigon" had a condenser and evaporator?

A. I really couldn't say—a ship of that age. I wouldn't say, sir. I don't know.

Mr. Wood: Do you mean she was an old ship? You say a ship of that age?

A. Yes, she was 1901, you know. Those things can be put in there. It has been done. It is not an expensive article to put in, you know.

Q. Captain, would you consider a ship too stable in leaving port if, when she arrived at her destination, after using the water and coal that she did use, she would lean over at an angle of 7 degrees on a shifting of the wind?

A. She is pretty tender.

Q. Would you consider her, I say, too stable under those conditions for her voyage?

A. No, sir, she is too tender, 7 degrees and a half.

Q. If when she was navigating now, she shifted

(Testimony of Francis W. Cullum.)

the helm over she perceptibly changed her upright position what would you consider?

A. The ship changes the upright position when you put the helm hard over, you know.

Q. That is one way of testing whether they are stable or not?

A. Yes. If you have reserve ballast tanks, put your helm hard over, if she heels over very much she is getting a bit tender. All ships heel over a little bit with the helm.

Q. So the man who is handling the ship under those circumstances is the best judge of whether she is too tender or not?

A. Oh, yes; he knows his own ship.

CROSS-EXAMINATION.

Questions by Mr. Wood:

Captain, this question of the salt water in the tanks, you say that the reserve tanks, those other than No. 3, have to pass their water through No. 3 in order to reach the boiler?

A. Yes. You have to put it from No. 1 into No. 3 to get to the boiler in an ordinary cargo boat. In a big passenger boat they feed from all kinds of ways. But in an ordinary cargo boat they generally have one feed tank.

Q. As I understood the other witnesses, they said that after the boiler had sucked in No. 3 tank, taken all the water it could out of No. 3 tank, there would be some water left in No. 3 tank?

(Testimony of Francis W. Cullum.)

A. Oh, yes, sir, you never get it quite dry.

Q. This is what the Japanese captain says.

A. Yes.

Q. "Then in that condition the water would swash back and forth in No. 3 tank, so that when the ship heeled over, let us say in this southwest monsoon, the water would come on her starboard side and keep her heeled over somewhat."

A. Yes, somewhat, certainly. All the slack water would go over to one side.

Q. It was my idea that when he got No. 3 tank so empty that he could not use any more of the water out of it, there would not be any harm in filling it up with salt water to prevent this swashing back and forth of the water. Do you say that cannot be done?

A. Oh, you can fill it. You wouldn't fill it with salt water.

Q. But he has used all the water he can out of it.

A. But has he used all the water in the other tanks?

Q. No.

A. Why doesn't he fill it with fresh water from the other tanks? He can fill up with fresh water from the other tanks. Ten to one his No. 3 is bigger than his No. 1. He will fill up No. 3—empty No. 1; have his No. 1 empty, fills up No. 3.

Q. But his No. 1 is a smaller tank?

A. Yes, it will be practically empty, with a few

(Testimony of Francis W. Cullum.)

inches in it that you cannot get out of any tank; that is, ballast tanks.

Q. Then he would have a smaller tank, No. 1, partly empty, would he?

A. Practically empty. That is a smaller tank than No. 3, and he puts it all into No. 3.

Q. It is practically empty then?

A. As far as the suction can take it down.

Q. Then if he wants to he can fill the smaller tank with salt water?

A. Yes, he can put salt water into that; no objection to that.

Q. So the net result is, he can if he wants to keep his ballast tanks nearly all full of water, either fresh or salt?

A. On emergency. But what kind of ship is this? Must she carry those tanks full of fresh water to go across the ocean?

Q. No, not full of fresh water. I will give you this ship. This ship, No. 3 tank had 181 tons capacity. I don't remember the capacity of the others. But her water consumption was 12 tons a day. Now, she took 26 days to go to Nagasaki.

A. She would take more than No. 3 and No. 1 tanks of water to take her across the ocean, across the Pacific, so she must have that tank filled with fresh water again when she gets to Nagasaki.

Q. Yes, but she can fill up at Nagasaki again.

A. She has salt water in there.

Q. Can't she get it out?

(Testimony of Francis W. Cullum.)

A. I say there is this few inches in the bottom of the tank.

Q. When he is at Nagasaki can't he put an auxiliary pump in to pump that tank out?

A. No, how can he? He has cargo on top of it now.

Q. Do you mean to say he can't get into No. 3 tank?

A. Oh, yes, No. 3 he can. I say he never would put salt water into No. 3 tank. Of course in an emergency, case of life or death, he would. But you have to give an explanation when you get home about it.

Q. But when he is going from Nagasaki now to Singapore of course he can take water again at Singapore?

A. He can take water at any port he goes into.

Q. Can't he make that voyage ordinarily on No. 3 tank alone?

A. He takes 12 ton a day, you can work that out yourself. You know the capacity of No. 3 tank, and she takes 12 ton a day.

Q. Yes, I think that is right. If the worst comes to the worst he can put salt water in any of them?

A. Any tank you can fill with salt water, yes.

Q. Is it true—there seems to be some difference between the two Japanese captains on these longitudinal sections that go through these tanks

(Testimony of Francis W. Cullum.)

—is it true that most of the trimming tanks of most ships have tight longitudinal sections?

A. It would not be a trimming tank unless it had.

Q. And other tanks that are not trimming tanks may have longitudinal sections with holes in them?

A. Yes.

Q. Where a ship has no longitudinal sections tight in her trimming tanks, she is not so easily controlled as to her tenderness or stability, is she?

A. No, she is very hard to control; very hard.

Q. Now, you have spoken of a ship being hove to several times.

A. Yes.

Q. That means when a ship is placed in the best position to stand the sea, doesn't it?

A. Yes, sir; generally put the wind on your shoulder, on the bluff of the bow, just about a point on the bow.

Q. That is what I was going to say. So that in crossing the monsoon sea from that head, Achin Head, to Colombo, you would have really the seas on the port bow, would you not?

A. You would have them about four points on the bow; angle of 45 degrees.

Q. One of the best places, in other words, to take a sea, is it not?

A. The best to take a sea is right on the shoulder, a point on the bow.

(Testimony of Francis W. Cullum.)

Q. Well, it is a pretty good place to take it, isn't it?

A. It is better than the beam. That is all I can say about it. It is not a very good place, all the same.

Q. Isn't it almost the place you take it when the ship is hove to?

A. No, you generally take it about a point on your bow.

Q. Now when she turns that point there at Colombo and goes up toward Bombay, does she then have the sea abeam or on her port quarter?

A. On her port quarter? I think she would have it abaft the beam, from beam to a point abaft the beam.

Q. The monsoon is not a thing that comes suddenly, is it? It is a steady wind, velocity five or six?

A. Yes. The monsoon comes every year the same time.

Q. A steady swell?

A. Yes, big swell. I cannot say steady swell. It is a big swell.

Mr. Hayden: I understood the witness to say there were squalls with those. I don't know whether he understood you to say a steady wind without squalls.

A. It isn't a steady wind. As I told you before, I think I explained it, about a force of five

(Testimony of Francis W. Cullum.)

or six, with heavy squalls that come up of course to eight at times.

Q. But the sea is the important part, not the wind, in these monsoons.

A. Yes, the sea is the important point.

Q. And the sea is very much the same continuous swell?

A. Continuous what we call hollow sea, falling over sea, more of a breaking sea. It is not a rolling sea; it is more of a breaking sea.

Q. I suppose that is what Captain Hoben meant when he said kind of a chop.

A. Yes, it is a breaking sea.

Q. I am glad you and Captain Hoben agree on one point. It is not a dangerous sea, though, is it?

A. It is more dangerous than the rolling sea.

Q. Well, you said it was not a dangerous sea. I will let it go at that. You said that before.

Court: In your navigation going up that coast do you navigate along in the trough of the sea?

A. Yes, you have to navigate pretty well towards the land. You are pretty well in the trough of the sea going there. You cannot get out of it very well.

Court: You go pretty close to the land?

A. Yes, you go pretty close to the land, for the simple reason that these squalls with rains coming on, the captain is very likely to lose his reckoning unless he gets a glimpse of land between the squalls and then he knows where it is.

(Testimony of Francis W. Cullum.)

Court: Like coming up the California coast?

A. Yes, same thing. The captain picks up a bit of land, points where he picks up observations.

Q. In the Blue Funnel Line you never carried lumber cargoes or deck loads at all, did you?

A. No, we don't carry deck loads.

Q. And you have had no personal experience in this lumber business at all, have you?

A. No personal experience carrying lumber at all, no, I have not, not on deck.

Q. Is it the province of the master or the engineer to arrange the bunker coal in the ship, and the water she shall carry, and so on?

A. No. The ships I was in the master does everything. What he says is absolutely law at sea.

Court: You say the master does that and not the captain.

A. The captain is the master, sir.

Mr. Wood: I was asking about the engineer as contrasted with the captain.

Court: Very well.

A. Of course in all cases on a well-run ship the master consults with his engineer. He is not arbitrary, you know.

Q. The difference in cargo that a ship carries—I am thinking now of this Ixion and Talthibius—makes some difference in the way they behave too, doesn't it?

A. What, the coal?

Q. No, the cargo she carries, how she is loaded.

(Testimony of Francis W. Cullum.)

A. Yes. But we were carrying the same cargo on those. Practically the same cargo with lumber underneath.

Q. Coal stowed the same, same water.

A. Yes, the same coal, same water, whole cargo the same.

Q. In other words, you cannot account for this apparent difference?

A. No. I know the ships are just the same. Any captain will tell you that.

Q. When you were speaking of them, you said you had very bad weather across the Pacific.

A. Yes, I have had bad weather across the Pacific; down to three or four years going across every month or so.

Q. Certain seasons on the Pacific are very bad, aren't they?

A. Exceptionally bad. Some are very nice. I have good ones and bad ones.

Q. How would the bad season on the Pacific compare to the southwest monsoon season in the Indian Ocean?

A. Oh, well, the winter season in the North Pacific is worse than monsoons.

Q. That is what I thought.

A. Sure, if you get in a northwest gale, a southeast gale off the coast. Of course it is a bigger sea than the southwest monsoon—big southeast gale. It is not so continual though.

(Testimony of Francis W. Cullum.)

Q. The North Pacific at certain seasons of the year is a very bad ocean, isn't it?

A. Granted.

Q. Is it a fact that the older ships have heavier engines, or anything like that, than the more modern ships? Heavier in weight, I mean.

A. I know, more massive in build.

Q. Yes.

A. I think the tendencies are that way, but I think very little. If anything, the tendency is that way, I think.

Q. Anything else about the older ships that are heavier than the more modern ships.

A. Yes. I think the frames come more close together on those old ships than they are putting them now. They used to go more—well, they had more latitude in their strength; they gave more to be sure of it.

Q. How far apart are the frames in the more modern ships?

A. Modern ships, the way they build them to-day, are three feet.

Q. And the "Saigon" was two?

A. The "Saigon" they said it was two.

Q. Would this extra weight on the "Saigon," due to her frames being closer together, engines heavier, act as some of that extra ballast that you would have to put in a deep ship to keep her from being tender?

A. Yes, as I said before, her engines might be

(Testimony of Francis W. Cullum.)

heavier; but very, very little—hardly perceptible, I think.

Q. The fact that she is built heavier would be a reason for building her a little deeper, wouldn't it?

A. Oh, no, I don't think that.

Q. So that when she has displaced the amount of water required to float her, she will still have the proper cargo capacity?

A. If she has got her frames two feet apart, they come right up, it is the same thing. Two things that equal the same thing equal one another.

Mr. Hayden: What did you say?

A. The frames being two foot apart will make her heavier. Those frames come right up to the main deck. It comes to the same thing.

Q. But it would put the ship deeper in the ocean wouldn't it? She is heavier?

A. Yes, but that would be owing entirely to her fineness, her coefficient of fineness. If she is built this way (illustrating) she would go down deeper. If she is built like that she won't go down deeper.

Q. Well, I think you have said enough to give me the basis of what I want. Does difference in depth of mold, molded depth of ship from six inches to one foot six make much of a difference in her stability?

A. It will make a difference. I won't say how much.

Q. Not a great deal?

(Testimony of Francis W. Cullum.)

A. It makes a difference. That is all I know. It will make a difference.

Mr. Wood: I don't want to go over that sag again, your Honor, because we have had it so much.

Q. As I understand you think of a sag as a gradual motion of the cargo due to the waves beating on it?

A. No, it is a send. It doesn't shift.

Q. You have no idea how much it would sag?

A. I have no idea only just——

Q. You haven't carried one?

A. No cargo experience only what I have read and studied about it. Every master has to study all clases of cargoes. Every man has to have his first cargo, and he has got to know all about it.

Mr. Wood: I don't know whether your Honor understands. I don't know the difference this man makes between a shift and a sag.

A. You don't. A shift the whole thing shifts and stays there.

Q. And when it sags?

A. It comes back again. It is like a bough of a tree. The bough of a tree sways.

Q. It is like the movement of the ship itself?

A. Yes.

Court: The idea I got of what a sag is, there is the load standing there at the edge, and when she goes over she goes in diamond shape. When she comes back, she comes back to her original position.

Q. Is that what you mean?

Vol. II
TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [REDACTED] 1922

No. [REDACTED] 129

**OSAKA SHOSEN KAISHA AND UNITED STATES FIDELITY
& GUARANTY COMPANY, PETITIONERS,**

vs.

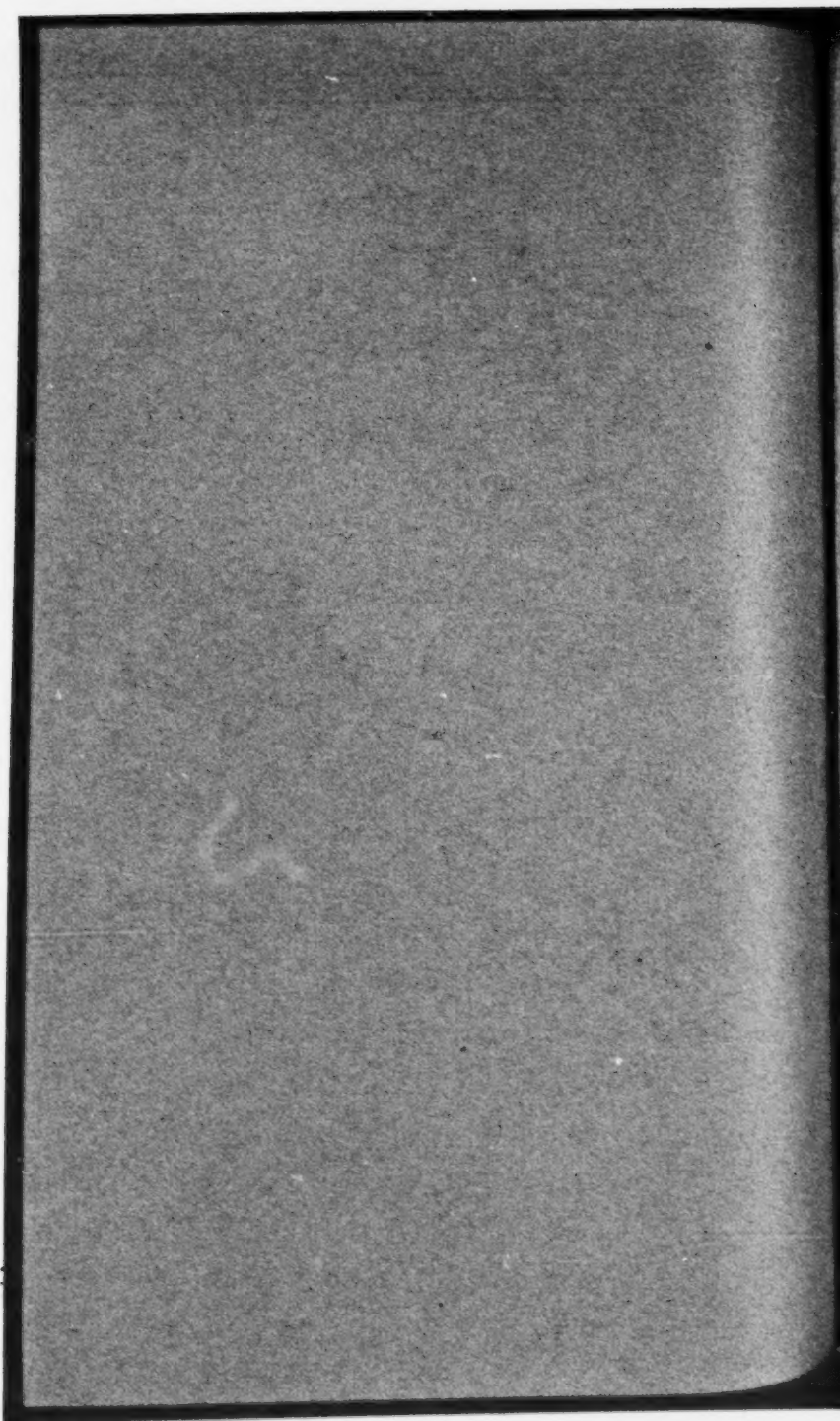
PACIFIC EXPORT LUMBER COMPANY.

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.**

PETITION FOR CERTIORARI FILED JULY 25, 1921.

CERTIORARI AND RETURN FILED NOVEMBER 22, 1921.

(28,382)



(Testimony of Francis W. Cullum.)

A. A sag stays in a bit, you mean? It doesn't come back the next roll.

Mr. Hayden: I want to have this idea. The captain has just expressed it if we catch his words. He says a sag stays in her, it doesn't come out the next roll. That is the point about a sag.

Court: If it rolls back far enough it does come out.

Mr. Hayden: It is like driving a nail in. If you drive a nail in a board a certain distance it stays there. You can drive it back if you hit on the other end; punch it out. That is what a sag is, a sag of lumber is. The blow on the ship drives that lumber over to one side. It stays there. When they are talking about it coming out, it comes out when they turn around and the other direction gets the blow.

Q. Yes.

Mr. Hayden: It isn't with every roll of the ship.

A. It isn't with every roll of the ship.

Court: That explanation that you handed me in the book is a very good illustration.

Mr. Hayden: It stays there.

Adjourned until 10 A. M.

(Testimony of Francis W. Cullum.)

Portland, Oregon, December 18, 1919. 10 A. M.

FRANCIS W. CULLUM resumes the stand.

CROSS-EXAMINATION—Continued.

Q. Captain, you explained to me after you left the stand last night that the shift of a cargo would be where the lashings would give or break, but the sag would occur within the lashings.

A. The sag occurs within the lashings, yes.

Q. And a shift, you said, would be dangerous, but a sag would not be dangerous.

A. According to the size of the sag. If the sag rises up to be dangerous, in a case like this if it rises up against the steering rods, it would be dangerous then.

Q. It would be dangerous?

A. If it jammed the steering rods.

Q. If there wasn't enough room between the cargo and the steering rods? Is that what you mean?

A. Yes, if there wasn't enough room for the sag.

Q. But you have no idea how much of a sag that would be, have you?

A. I have a good idea, not exactly from experience with lumber cargo, but as a sailor. We have to learn about all cargoes, ready to take any cargo on the face of the earth, and we have to learn all about it through other men's experience which is written in books, and our own common sense. But

(Testimony of Francis W. Cullum.)

if you like about this sag, without putting it into words, let me show you what I mean.

Q. All right, I wish you would.

A. I can show you exactly what I mean. Here is the cargo in the ship, deck cargo, lashings all around this deck cargo. Now, to shift it, I call it that way. Now, I call a sag of the cargo going that shape (Illustrating).

Court: That is the exact idea I have.

A. Now, that cargo in a ship gradually, gradually, gradually gets that shape. Now, if the ship turns over on the other side, that sag won't come out of her all at once. You have to have her come up till you get a sag that side. That is what I call a sag. That is the difference between a shift and a sag.

Q. Even though you haven't had any experience with lumber cargo, I would just like to get your idea for what it is worth as to how much of a sag there would be on a properly secured cargo.

A. I should say a properly secured cargo, it depends on the height of it. There would be more sag on a high cargo than what there would be on a low cargo, because you have more of an angle for the sag.

Q. On a cargo of 11 feet would there be a sag of 2 inches? Could there be?

A. There could be I should say more than two inches. Two inches isn't over much because, for instance, with a sag—you have a deck load say to

(Testimony of Francis W. Cullum.)

10 feet high, we will say we have logs 12 x 12—14. Every one of those logs have so much space in between. It is impossible to bring them face to face. Before the sag comes in those have to go and all join up together, all that part comes on one side, if she is on that side, altogether one time.

Q. When you speak of logs do you mean square timbers?

A. Square timbers. Square rough-hewn timbers. All of those parts have to come up with the hammer—hammer—comes closer together. You have that to contend with before you have an ordinary sag of the cargo itself after that. I should say it would be anything up to 4 inches.

Q. Anything up to 4 inches?

A. I would say it would be 4 inches or over.

Q. On a high cargo?

A. On a high cargo 4 inches and over. Certainly be over 4 inches I should say.

Q. That would be your opinion?

A. That would be my opinion—or over.

Q. Is that taking into consideration that these lashings may be tightened every day throughout the voyage, or throughout the early stages of the voyage?

A. Early stages of the voyage I suppose they would tighten those lashings up, on deck-cargoes always.

Q. Do you take that into consideration?

A. Yes, I take that into consideration too; be-

(Testimony of Francis W. Cullum.)

cause you take them up as the cargo, when you go to put those turnbuckles on, you turn those turnbuckles till you cannot get any more. As she gets to sea she gets working, these get tighter together. Next morning you find a little slack—tighten that up again.

Q. Considering that this vessel first made her voyage across the Pacific to Nagasaki, during which time the cargo has worked, that is, worked until the lashings have been taken up and tightened, don't you think that the cargo would be so worked together and the lashings so taken up by the time she arrived in the Indian Ocean that all the play would have been taken out of her?

A. As she got in the north Pacific—I have gone across the North Pacific here; in fact coming up and down the Sound wouldn't be very much different, yet I have gone across the North Pacific, very rough indeed down there. It would depend upon what kind of weather she has got.

Q. The log shows that this vessel throughout this whole voyage encountered fairly good weather, moderate breezes, moderate swell, and things like that. Would you say by the time she had made that sort of voyage and reached the Indian Ocean the play would have been taken out of the cargo and the lashings pulled up so that there would not be any more play left in her?

A. No, if she has got ordinarily moderate fine weather, I don't think it would. If you got in a big

(Testimony of Francis W. Cullum.)

gale of wind, I think you would find she had some play in her, if she got into the big heavy blows.

Q. A sag would not come suddenly however; it would come gradually?

A. Oh, no, a sag is continual pounding, pounding one side until it gets over; as I say, it sags.

Q. It would sag gradually?

A. It comes gradually, yes. It never comes at once.

Court: In that connection let me ask you how many days would it take you to go from Colombo to Bombay along that coast?

A. About five days, sir; about that time.

Q. Yesterday, Captain, we were discussing the ballast tanks and since then I turned to Captain Yamamoto's testimony on it.

A. Yes.

Q. And he said he used out of No. 3, No. 1 and No. 5. It is on page 35 of his deposition.

A. Yes.

Q. And No. 3 has 181 tons, No. 1 126 tons, and No. 5 96 tons.

A. When No. 3 tank is nearly empty—I won't say nearly empty; when he has got sufficient room in No. 3 tank, if No. 1 tank is smaller than No. 3—

Q. It is.

A. He will wait till he gets sufficient room in his No. 3 tank, then he will empty the whole of No. 1 out, as much as he can possibly get out of it, that will about fill his No. 3, you see. His No. 1 is prac-

(Testimony of Francis W. Cullum.)

tically empty, with the ordinary washing of the tank we may say, about a maximum of 3 inches in the tank.

Q. Then after that he can fill that with sea water to steady the ship?

A. Oh, he can fill it with sea water if he wants to put salt water in his tanks.

Q. After he has consumed both No. 3 and No. 1, if the voyage lasts that long, then he can empty No. 5 into No. 3?

A. Yes. He won't wait till No. 3 is empty. If No. 5 is smaller, he will wait till No. 3 is down, then keep No. 3 as full as possible.

Q. After he has emptied No. 5 into No. 3 he can fill No. 5 with salt water?

A. Yes. If he has fresh water tanks, you know, he will fill his fresh water tanks.

Q. 1, 3 and 5 is what he used.

Court: Those are the fresh water tanks?

Mr. Wood: Yes, your Honor.

Court: And the others are salt water tanks?

Mr. Wood: Yes.

A. As far as I say, if he got an emergency he can fill all ballast tanks with salt water if he likes.

Q. On this same page in his testimony he says that his daily consumption of water is about 12 tons and that 6½ tons of drinking water is taken from the after peak and from this small tank, that is the galley use, the people use; and the engine machinery take from No. 3.

(Testimony of Francis W. Cullum.)

A. Yes, he means feed tank, comes from No. 3 tank only he says 12 tons of feed water plus six tons of what we call domestic water. Is that what you mean?

Q. I don't know. I was going to ask you what you would understand him to mean there; whether his 6½ tons of drinking water, water for culinary use, and so on, was not included in his 12 tons.

A. No, not with an Asiatic crew. An Asiatic crew use water wholesale. 6½ tons a day for an Asiatic crew is very moderate.

Q. I rather think you are mistaken about that.

A. All right. That is my opinion with an Asiatic crew. I am just giving my opinion about it. 12 tons of water, that is not excessive for the boilers, you know, in a three-boiler ship.

Q. Would an Asiatic crew use 6½ tons of water for drinking and culinary use a day?

A. I haven't the slightest doubt—not for drinking and culinary use; it is wasting and washing, one thing and another.

Q. They would use that much a day?

A. Yes, they would use that much a day easy.

Mr. Wood: I will say, your Honor, it is a little confusing here, but I think the testimony indicates that the 6½ tons of drinking water is included in the 12. I will read it: "Q. What is your daily water consumption? A. My daily water consumption is about 12 tons. Q. Where is that water taken from? A. 6½ tons of drinking water is taken from the af-

(Testimony of Francis W. Cullum.)

ter peak and from this small tank that is the galley use, the people use; and the engine and machinery take from No. 3." From which I infer that the 6 $\frac{1}{2}$ tons is a part of the 12.

Court: That ought to be easily ascertained; ought to know the consumption of the boilers.

A. 6 $\frac{1}{2}$ tons a day consumption of three boilers was very small I should think. We don't know she has got an evaporator. If she has an evaporator it is about right. If she has not an evaporator it is very small indeed.

Q. He says that on the voyage from here to Nagasaki he used out of tanks 1, 3 and 5, and 1, 3 and 5 would not hold enough water on your theory that it is 12 tons a day plus 6 $\frac{1}{2}$.

A. Yes.

Mr. Hayden: How many tons of fresh water did he have, Mr. Wood?

Mr. Wood: He had 181 in No. 3, 126 in No. 1 and 96 in No. 5.

A. Hadn't he any in his after peak?

Q. Yes.

A. His after peak was nearly full, I think.

Q. I haven't got the data on that. Oh, let's see—the after peak had 45. Is that fresh water in the after peak?

A. Fresh water, yes.

Q. You said that Nagasaki would be a midway coaling port on this voyage? As a mater of fact, however, this ship did coal at Singapore again?

(Testimony of Francis W. Cullum.)

A. Yes.

Q. And if you divide the voyage into three stages, with two coaling ports, instead of two stages with one at Nagasaki, then Muroran would be the very convenient port to coal at, wouldn't it?

A. Yes, it would be a very convenient port to coal at, but the master of the ship generally has nothing to say about the coaling port at all. The master of the ship gets orders from his owners to proceed to so-and-so and coal. He will do his very best to do that. If he is ordered to, he would take coal at Singapore if possible. It doesn't come into his calculations at all; he has to obey orders.

Q. Muroran hasn't any such narrow entrance that ships cannot get into it?

A. Oh, no, the biggest ships in the world get into Muroran as far as breadth goes.

Q. What kind of cargoes are these you carried in Blue Funnel ships across the Indian Ocean, where you kept the hatches open to keep them aerated and ventilated?

A. All kinds of cargoes from spices to silks and silks to tapioca; rice, all kind of things; a hundred and one commodities.

Q. General cargoes?

A. Most general cargoes.

Court: Do you carry cotton cargo on deck?

A. No, your Honor.

Court: You don't carry cotton cargo on deck?

(Testimony of Francis W. Cullum.)

A. No, don't carry cotton cargo on deck at all. It is all down below.

Mr. Hayden: Might stow it under the house or in the poop, if they have that closed in, might they not?

A. Oh, certainly, put the best of cargoes in those places. They are water tight.

Q. That would be equivalent to on deck, as far as weight is concerned?

A. That would be equivalent as far as stability to built up on deck. It is water tight, just the same as the hold would be but it is on the main deck. I don't carry it exposed to the weather.

Court: Not at all exposed to the weather?

A. No.

Court: Then you would not carry any of it between the bulwarks on the deck space?

A. No, no, not across there.

Q. Captain, I will show you this chart of the China Sea marked "Claimant's Yamamoto No. 2." Now, this is Nagasaki up here, is it not?

A. Yes.

Q. This red line you testified marked his voyage—

A. That is the track down to Singapore.

Q. These are the Philippines, aren't they?

A. Philippines? Let's see, yes.

Q. You said those typhoons originated off the east coasts of the Philippines?

A. Yes.

(Testimony of Francis W. Cullum.)

Q. And took a west-northwestern direction?

A. Yes.

Q. Is that something as indicated (Referring to chart)?

A. West-northwest, yes; originate here and here and go away down to 10 North. See here is 10 North, on the east coast, they originate about 10 North, 10 to 20 North, 10 to 15 North, they originate, and up to about 135 I think the books say East. They originate from here to there anyway, and go to there in west-northwest direction; come right across here.

Q. Would you mark, Captain, with this pencil the path of those typhoons.

A. Expected path of typhoons?

Q. You just said they went west-northwest from the Philippines?

A. Yes.

Q. Mark the northern and southern limits of probable typhoons.

A. Southern limit is 10 (Marks on map), and when they get here they recur to the north and north-east, according to record, they get away up here. They recur, you see. Some of them don't recur. Some of them come right across and disperse on the coast of China.

Q. This first line you mark is the southern limit?

A. That is the southern limit, yes; west-northwest. I don't say that is west-northwest course, you see.

Q. This is approximate—something like that?

(Testimony of Francis W. Cullum.)

A. Yes.

Mr. Wood: May I mark on here southern limit?

A. Now, let me correct myself again. It has been known for typhoons to come right across here west and west—west and west-northwest direction. Typhoons have been known to come right around here.

Q. I am talking about probable.

A. Well, say west to west-northwest course. You have to find that out as you come along, you see; the wind blowing you will find that out.

Mr. Hayden: You might also mark on the chart their coming this way.

Mr. Wood: I am going to get that—what Captain Cullum indicates as his opinion.

A. It is not my opinion; it is opinion of all writers—experience.

Q. Could you indicate the northern limit of them?

A. Well, I could probable northern limit. They generally come across here. We will say this typhoon goes west-northwest, that is the northern limit; west-northwest—goes west to west-northwest; comes along here; more than likely it comes along here, around that island there; comes around it, recurs to the north of Formosa channel.

Mr. Hayden: Make a mark right as you go.

A. Right up this channel, as it comes up it gradually comes to northeast, goes through Van Dieman's Strait, gets away to the North Pacific like

(Testimony of Francis W. Cullum.)

that. That is where it recurs, about, you see. It might recur east of Formosa, right down through Van Dieman Strait. Down around here of course they go further north, go further north in September than what they do in July.

Q. How far north here may they come? I suppose they may come a little further north?

A. Oh, they might come a little further north, and they might go a little further west.

Q. I asked you first for the southern limit of the probable typhoon. Now I want the northern limit of the probable typhoon. May it be something like this?

A. Yes, you can have one up here, a small typhoon. But the big typhoons that we are frightened of in the China Sea originate around here and then come up in a west-northwest direction. As to the limit, I think I made a mistake, that is, the northern limit; it comes west to west-northwest; that is the western line. There is the northerly limit of it you see; the west is here.

Q. You now rather correct this to say this is the northern limit?

A. No, I wouldn't say it is the northern limit at all.

Q. You say, Captain, these typhoons travel in some sort of path, don't they?

A. Yes, the typhoons may come here. They originate from 10 north to 15 to 17 north, so you could not hardly—you have to find that out as the wind

(Testimony of Francis W. Cullum.)

comes along. You have to calculate on that wherever you get your wind.

Q. I know, but I want your opinion as navigator, experienced in these seas on the probability of it.

A. Oh, the probability is quite a different thing altogether. As I say, they go from west to west-northwest on the one that makes up in 10; we will have another one that makes up here, 15, it will go the same, west to west-northwest.

Q. The northern limit would be somewhere north of this 17?

A. Yes, the northern limit would be about 17, I should say where they make up.

Q. Now, from there, one originating—we will take a northern one now, one that is originating far north—where will it go?

A. It will go west-northwest again—west to west-northwest; I should say something like that. That will strike the coast of Formosa. Ten to one that will recur up here; will recur up here, come in the same direction up there, you see. Formosa is very high land, and very few of them go right across there.

Q. Would it be proper to mark this "Probable limit of northern area?"

A. Yes, probable limit.

Q. Now, you want to take care of these possible ones. These are not so frequent down here further south, are they; a little less probable down here?

(Testimony of Francis W. Cullum.)

A. Yes, I think the most of them come up here; the most of them come across—here is Manila Bay here—some of them come across here.

Q. Now, you want to mark the limit of those southern less frequent ones.

A. The most southern one is ten; never have them below 10; I should say 10; if one came right dead across here, and finishing up in here, you see, on that high land, it has been known to do that; but they are not so frequent as the further north ones; if you have one coming right away down here, it does not as a rule go up Formosa Channel; it disperses on this high land here.

Q. Southern limit of possible typhoon?

A. Yes, southern limit of typhoon. You can expect a typhoon anywhere from 10 north. After that you are perfectly safe—they never occur down here; never occur.

Court: This course as it turns north here approximates the ships' course?

A. Yes, it comes right up here and comes around, Formosa Channel is very narrow, they come along, find an outlet and run up.

Court: How do you avoid that?

A. When you get them in there, you cannot avoid them, very, very seldom; the most dangerous part.

Q. You mean between Formosa and the mainland?

A. Yes. If you get a typhoon running right up

(Testimony of Francis W. Cullum.)

there you have got to face it out the best possible way.

Q. In the Formosa Channel?

A. In the Formosa Channel, yes. Well, Formosa Channel, you cannot run very far, you know. There are islands and all that around. You never have more than 100 miles of good distance to run away from one of these things.

Mr. Hayden: What is the width of those typhoons?

A. Where they start up in 10 north they may only be about 5 miles in area. As they go along they increase in area. They have been known to be as much as 300 miles when they are going up the China Sea. They start and they get bigger as they go along. When they get up in the China Sea they have been known to be 300 miles in width.

Q. Did you ever have coal ignite in your bunkers through spontaneous combustion?

A. Yes, two trips.

Q. What bunkers were they?

A. Side bunkers, one on each side of the boiler; narrow part that comes down.

Mr. Hayden: Just a little louder.

A. Yes, I have had fire on two trips.

Q. How did you put it out?

A. Dug down a bit and then filled it with water.

(Testimony of Francis W. Cullum.)

REDIRECT EXAMINATION.

Q. Captain, you were asked yesterday, I think, as to how monsoon seas compared with the seas in the North Pacific.

A. Yes.

Q. I think you said the North Pacific seas in a big storm ran faster and were different kind of sea from the monsoon sea?

A. Yes, the North Pacific sea is a great big rolling sea, heavy sea. That is a North Pacific gale of wind you are talking about?

Q. Yes, I am talking about a gale of wind.

A. Yes.

Q. The monsoon seas are rather shorter seas?

A. Much shorter sea and hollower sea; what we call a short choppy sea.

Q. I don't think you were asked to compare the seas of the North Pacific in the winter time with seas of one of these typhoons that may be met in the China Sea. Is there any difference between those seas?

A. Oh, yes.

Q. Characteristic of them?

A. Oh, yes, quite a lot of difference.

Q. Will you just tell us what your observation has been in that regard?

A. In the North Pacific in a heavy gale of wind the sea gets a big roll, heavy great big sea coming on, but it is not so high as a typhoon sea. A typhoon

(Testimony of Francis W. Cullum.)

sea, as I explained yesterday, I think, with low barometer, it rises up, heaps up, you know, and then it has got a force of wind behind it, regular course like you see the sea coming down in California, big rollers coming down on the beach, kind of hollow sea. You don't get those in the North Pacific, but in the China Sea that is the commonest sea you have got, come with a roll.

Court: You mean monsoon?

A. No, this typhoon. Hollow sea with a big roll like you see along the coast.

Q. What is the velocity of it?

A. Velocity of the typhoons from 10 up to 100 miles per hour; I think there has been one noted 135 if I am not mistaken.

Q. Now, describe the effort of a master when he gets in one of those typhoons to keep the ship in the safest position, and the effect of both wind and sea, that is, the way the wind and the sea vary with each other, if you will please.

A. That is the most difficult thing a master has got, because the wind in a typhoon is changing gradually you see; the wind changes quicker than the seas change; so if you bring her up head on to the wind that doesn't say you are head on to the sea. But if you stay there a little while that sea will come around head on to you here. By that time the wind had got around a bit more, you see. So the wind goes quicker than the sea.

Q. What effect has that?

(Testimony of Francis W. Cullum.)

A. You have to take a happy medium, which is most dangerous the sea or the wind; and as a rule it is the sea; therefore we find it very difficult to keep a ship head on to the sea with the wind on her a couple of points on her bow, you see.

Q. What is the effect of a deck-load on the ship in regard to holding her into the wind then?

A. Well, after you once get her up to the wind, it is all right, but it is very difficult to bring her up to the wind, especially a low-power steamer. It would be more difficult to bring her up with a deck-load, a low-power steamer, with a deck-load than what it would without, especially if the deck-load is higher on one end than the other. If the forward end is higher than the after end it makes it more difficult again. I doubt if she would stay up at all.

Q. You are trying to balance the ship of course, as a navigator by adopting the least of the two dangers, the danger of the wind or the danger of the sea, as I understand it.

A. Yes.

Q. Now, when you are doing that, trying to hold up into the wind, is the sea uniform? Does it always, or the wind always come from exactly the same quarter, in perfectly uniform fashion, so that you can anticipate the whole situation?

A. Oh, no, no. It is most confused. The sea comes up from all directions. At times you hardly know what is bringing the sea up. It is a kind of boiling cauldron all around you. The sea comes

(Testimony of Francis W. Cullum.)

from all directions. You can get a great big sea off your forward bow; before you turn around, no reason given for it, it will change and hit you on the other bow. Most confusing, the sea which this whirl creates.

Q. Would you consider a ship with a deck-load of lumber safer in North Pacific seas than in a typhoon sea?

A. Oh, yes. You are safe in the North Pacific sea, I think. That is my opinion.

Q. What is your opinion as to whether or not if a ship got into one of these typhoons with a heavy deck-load of lumber, and was tender at all when she left port, what is your opinion as to her going through it or carrying her lumber?

Mr. Wood: Do you mean now in the center of a typhoon?

Mr. Hayden: No, I don't mean the center. I mean where she may get it doing the best she can to keep out of the center, Mr. Wood.

A. That depends entirely on what part of the typhoon she is in. If she is in reasonable distance that ships get into, if she got in one of those typhoons with a deck-load—you say she is pretty tender—she got one of those seas on her getting a fair slap at her, as we call it, the deck-load has either to go over the side or the ship goes on her beam-end, if she gets one of those seas. There is only one of two things. If the deck-load holds, she would go right on her beam-ends.

(Testimony of Francis W. Cullum.)

Q. You have had some experience, have you, of seas boarding your ship in those typhoons?

A. Yes.

Mr. Hayden: If the court would like us to verify the witness' opinion about this thing by actual experience, I will ask him to describe one or two of them.

Court: He might describe one or two of them. I don't think it is necessary to take all his experiences.

Q. Describe one or two experiences, Captain. You spoke about a sea mounting you and carrying away your boat up on the bridge deck. Describe that.

A. That was in the North Pacific, sir.

Q. Was that a typhoon?

A. Well, that was in the winter months. It was cyclonic in its character, because it recurred, but I would not call it a typhoon, no.

Court: Do you have typhoons in the North Pacific?

A. Well, they come along, as I say, up Van Dieman Strait and get in the North Pacific; disperse in a big way in the North Pacific. When you get along the coast of Japan we get in tail ends of them dispersing.

Q. The sea carries on a good deal beyond the typhoon itself, doesn't it?

A. Yes.

Q. Go ahead and describe that.

(Testimony of Francis W. Cullum.)

A. Well, now, this was in—I wouldn't call that a typhoon sea, because it was the month of December—a big sea coming in the North Pacific. That sea hit me, and we had a boat about anything from 30 to 40 above deck—we call her boat-deck—and we had our boats two come one inside the other.

Q. How were the boats made fast to the deck?

A. Made fast with gripes, three pair of gripes each side, gripes put down with turnbuckle.

Q. Are they iron?

A. Yes, or chain; chain and turnbuckle, three sets each side of her. Then when we were going to cross the North Pacific in winter time we put lashings on as well, put extra lashings or ropes to these boats. On this particular occasion going across there in the month of December the sea struck me in there, and the outside boat was taken right away up, and it must have gone a long way up, because we found it turned bottom up inside the other boat and the other boat was not scratched. That boat must have gone up anything up to I should say 50 feet above the inside boat, right up like that, and then turned over and come down inside the other one.

Court: Was that in December?

A. In December, sir.

Q. That wasn't a typhoon sea, then? I made a mistake.

A. No, sir, that was in the month of December. Well, of course you can get typhoons in the month of

(Testimony of Francis W. Cullum.)

December too. But that gale of wind we had was of a cyclonic character, because it veered right around, you see, rather quickly for the North Pacific Sea.

Q. Now, I didn't ask you yesterday about the weight. I stated to the court what it was, the weight of this coil that you lost, this coil of towing wire.

A. I should say the weight of that would be approximately $3\frac{1}{2}$ to 4 tons; perhaps a little heavier. Certainly it would be $3\frac{1}{2}$.

Q. And what was the length and height of it?

A. The length of it would be 4 ft. to 4 ft. 6, and the height about the same.

Q. Do you think if the deck-load were exposed to a sea such as that that the lashings would hold it?

A. Oh, I just told you just now if a ship with a deck-load got a sea on her beam like that, either the deck-load, the lashings would carry away, or if they didn't carry away, if they were strong enough, I think myself, my opinion is, the ship would go on her beam-ends with a blow like that.

Mr. Wood: Would she come back?

A. It depends on the sea. When a ship once gets on her beam-ends like that, you know, everything has got right-angle weight on it, all the weight is down. I think she would be over her bearings.

Q. There was another instance you told me, Captain about starting out about the same time as another ship down in those typhoon areas you were going through, and this ship being lost. Do you remember that now?

(Testimony of Francis W. Cullum.)

Mr. Wood: We had this yesterday.

Mr. Hayden: This is another one.

A. Yes, there were two ships.

Q. In your own experience?

A. Yes, two ships didn't come through.

Q. Now, you told me also about a method by which you lashed a casting in the hold against the side of the ship and that casting in these seas being thrown about.

A. Yes.

Mr. Hayden: If the court cares to hear that.

Court: What is that casting?

Mr. Hayden: An iron casting that was lashed to ring-bolts in the side of the ship and shored up, as I understand it, with timbers and cargo, and when the ship got into one of these typhoons it broke its lashings and pushed itself away.

Court: You may describe that.

Mr. Hayden: This was in a typhoon.

Q. Just tell the court how that casting was.

A. That casting was steam hammer, weight about 20 to 21 tons. It stood up about 9 foot high, and I think it was 6 foot 6, if I remember rightly, and something like 4 foot thick. This was in the 'tween decks. We lashed that up against the ship's side, put lashings on as tight as we could possibly do it, with turnbuckles, and lashed it to ring-bolts, and then backed it up with cargo across the ship. We got in one of these typhoons, the typhoon seas hit her, and with the continual motion of the ship

(Testimony of Francis W. Cullum.)

those lashings eventually carried away. That was in the 'tween decks. It was not on the deck.

Court: Did you lose the casting?

A. The casting went right down in the lower hold, and we had bales of dunnage underneath there. At the time I was running contraband for the Japanese Government in the Japanese-Russian war, and bales of contraband were down there.

Q. You didn't lose your boat?

A. Oh, no.

Court: If it had been on deck it would simply have gone over.

A. If it had been on deck, yes; not the least doubt of it. Down below it had ten feet less leverage than what it had on deck.

Q. You said something, Captain, about the steamer Jason the day before yesterday, about the deck-load. Yesterday you were asked if the Blue Funnel Line took any deck-cargoes.

A. Yes.

Q. I think that you said no.

A. Yes, I said the ships I was in didn't take any cargo, if I am not mistaken.

Q. The Jason did?

A. Yes, she took deck-cargo from — to Southampton, U. K.

Q. When they were loading that deck-cargo was your opinion asked as to how much she could put on board of her?

A. Yes.

(Testimony of Francis W. Cullum.)

Q. Tell what took place and the result.

A. Well, the agent came down and asked me had I ever been in that class of ship. In that country they build ships by class, three or four exactly the same ships, when they are ordering ships. This ship Jason was a sister ship to a ship I was officer of three years. He came down and asked me had I ever been in that class of ship. I said yes, I was chief officer of a ship for three years, sister ship to her. So he asked me what I would think about her deck-load. I says, "I don't think the ship will carry deck-load at all; but if she does carry deck-load, I don't think she will carry more than up to her bulwarks." She had rather high bulwarks, about 5 ft. 6 bulwarks. I said, "I don't think she will carry more than up to her bulwarks, if she will carry any; but I don't think she will carry any at all." He says, "That is nonsense. The captain is going to put a 12-foot deck-load on her." I says, "All right, but he will never take it home. I can tell you that." The captain says it is all right. "Well, all right; you just came down and asked me my opinion." So they went up there and put a 12-foot deck-load on her of lumber, and they let it go from the dock—they had to go up to Union Bay, I think, for coal. After that, as soon as they let it go from the wharf, she went right over until the main deck was down to the water. An examination was made of her. People from Esquimalt came down—British Government cargo—it ended up they took that deck-load off to

(Testimony of Francis W. Cullum.)

about six feet. I think they took about six feet of deck-load off her and allowed her to go to sea. She was not safe.

Q. The cargo was loaded by the advice of surveyors, was it? Lumber surveyors?

A. As far as I am aware it was. Certainly it was loaded on the advice of the captain. He said he could carry it. Of course his calculations were wrong.

Q. I don't know whether it got into the record or not—there seemed to be some confusion—but you were asked about these beams of the ship, the ship being built heavier than the other ships, it being an older ship, and her beams being spaced closer together.

A. You mean the frame, not the beam?

Q. Well, the frames, yes.

A. Yes.

Q. The beams are what go across the decks?

A. Yes.

Q. They are attached to the frames, too, aren't they?

A. Yes, they come up like that (illustrating).

Q. So the beams would be closer together as well as the frames would be closer together?

A. Yes.

Q. You started to say something—whether it was gotten in the record I don't know; I want to clear it up—about if they were heavier on the bottom she would also be heavier on top. What did

(Testimony of Francis W. Cullum.)

you mean by that? That is on account of the frames being closer together?

A. I didn't say she would be heavier. I said if she is heavier on the bottom certainly she would be in proportion on top. They are all in proportion. One will counterbalance the other.

Q. These frames run up the side of the ship?

A. Yes, run right up to the main deck.

Q. And the beams?

A. The beams join between; that is where you put your deck on.

Q. If the characteristic was to build her heavier-she would be built heavier throughout?

A. Sure.

Q. The uprights would be built heavier as well?

A. She is in proportion. If she is light in beam she will be light on top.

Q. If she is a deep ship it will be in proportion?

A. Yes, she is built in proportion.

Mr. Wood: You say "sure." Are you certain?

A. Sure I say in proportion. I don't mean in the way you mean it.

Mr. Wood: Isn't it quite possible she might have heavier frame and lighter beams?

A. Oh, yes. I don't mean "sure" in the way it is emphatically. I just use that common speech. She could have lighter beams.

Q. After you come out into the Indian Ocean going across the mouth of the Bay of Bengal, how

(Testimony of Francis W. Cullum.)

long does it take to make that trip across; ordinarily, I mean? This ship ought to show.

A. Across the Bay of Bengal?

Q. Yes.

A. I haven't got all those mileages in my head exactly. I should say about four days. If you have the mileage and the number of knots she goes, of course you will find it.

Q. While you are making that trip across the Bay of Bengal, the sea is striking on the left-hand side of the ship?

A. Yes, on the port side going across there.

Q. Does that have the effect to make a sag in the cargo.

A. Oh, certainly.

Q. So she would have the sag and the sea affecting sag in the cargo while she was going across the Bay of Bengal?

A. Oh, yes, sir.

Q. As well as going up—

A. Oh, sure, yes, to a certain extent; not so much as the other way, but it would have the effect of giving her a sag; winds and seas hitting her on the port side.

Q. Captain, how frequently do you anticipate meeting one of these typhoons that the ships try to get out of the way of, and that you describe as a dangerous typhoon, while you are making that trip down through the China Sea in the season of June—say starting the 4th of July?

(Testimony of Francis W. Cullum.)

A. Well, I should say the 4th of July, in July, 4th to the 15th of July—well in July I think they run, the average run 2 to 3 a month. I think that is what statistics tell us.

Court: How long would it take you to go through those straits?

A. Straits of Formosa, sir?

Court : Yes.

A. You run through Formosa Strait with a ship like this in 30 hours. 24 hours if you go faster.

Court: A little over a day.

A. A little over a day, yes; that is, if you don't get head winds. Ordinary weather I am talking about.

Court: If you get information that one of those typhoons is coming up, do you go through the straits or do you wait until the typhoon passes?

A. If I know a typhoon is coming up the strait, I wouldn't attempt to go into the strait at all. I would run away to the eastward. I don't know how I am going to get information it is coming up the straits. Of course nowadays you can with wireless telegraphy. They tell you everything. It makes navigation easier than it used to be with no communication from the shore at all, sir.

Mr. Hayden: I understand there is no wireless on this ship.

A. It doesn't give you 24 hours notice it is coming up Formosa Channel. You cannot tell that ex-

(Testimony of Francis W. Cullum.)

cept by observatories. Nowadays they give you that with wireless.

Mr. Wood: If you were at the entrance of Formosa Channel and your barometer told you a typhoon was in the vicinity, you would have the alternative of not going into Formosa Channel, wouldn't you?

A. Yes. I don't suppose I would go inside of Formosa Channel, no.

Q. The typhoon, however, that you are getting information about, may be coming up on the east side of Formosa? In other words, you cannot tell the track of that typhoon definitely 24 hours in advance, can you?

A. Not 24 hours. But I say 24 hours, I say 20 to 24 hours, you get the first indication of it. Before the end of that 24 hours is over a few hours—12 hours I have a very good idea how it is making, in what direction it is going.

Q. So you have about 12 hours that you can get out of the way of it, as it were?

A. The first 12 hours—the last 12 hours I can tell better, because the thing is getting nearer to us, you see, and the ship is getting—you can find that out by the shifting of the wind. The further you are away in the big-circle the slower the shift is I should imagine, because you are in a bigger circle, you understand. The closer it is, in the smaller circle, the shifts come quicker, and you can find out the direction of it better.

(Testimony of Francis W. Cullum.)

Q. As a matter of fact, Captain, ships do the best they can to get out of those typhoons, but as a matter of fact a great many times they cannot get out of the typhoons?

A. Yes.

Q. There is no chance for them to run and get away?

A. Yes, they all try to get out of the way.

Mr. Wood: Don't lead the captain.

A. We all try to get out of the way of a typhoon. That is our business to get out of the way. Nobody is going to put a ship in a typhoon or anywhere near a typhoon if it is possible to avoid it; safer for the crew and all concerned; doesn't do your ship any good.

Q. In your experience you have had to be in them?

A. I have had to be in them. I would say I have had to be in them. One occasion I told you I had to go through.

Q. There was another case you told me where you drifted over 100 miles around an island.

A. I was not master of that ship. I was officer.

Q. Just tell the court that experience.

A. I was on a ship in the China Sea. A typhoon was coming on. The master of the ship—I was only ship's officer—came to the conclusion it would be a very good thing to stay where he was.

Court: You spoke about that yesterday, and he went down.

(Testimony of Francis W. Cullum.)

A. Oh, no, sir. I was on the same ship; I was chief officer. I was not captain of the ship. The captain came to the conclusion—he called me up in consultation.

Court: I don't think it is necessary to go into that.

Mr. Hayden: I was just going to show, your Honor, all these to show the impossibility of getting out of these typhoons, and sometimes how far you will drift in a day; how far they move. Here is an illustration of where this ship went right around an island; over 100 miles away from where she was, in 24 hours.

Court: She made her voyage all the same.

Mr. Hayden: Yes, but just as an illustration how a ship will drift, how fast those come on. We are talking in this case about a ship that in good weather will only make $7\frac{3}{4}$ knots an hour—we are talking about her getting out of the way of a typhoon; and here is a ship that has actually drifted in one of those typhoons pretty nearly as far as this ship will run in 12 hours.

A. In this particular case we drifted over 100 miles in 24 hours. We didn't move the engines at all.

Court: You drifted out of your course?

A. Out of our course, yes, sir.

Mr. Wood: You didn't move the engines at all?

A. No, one of the old-fashioned captains, he thought the ship better just stay there.

(Testimony of Francis W. Cullum.)

Mr. Wood: How did you keep her head to the sea?

A. We didn't keep her head to the sea. We weren't in the center of the typhoon. He thought we were far enough away to be safe.

Mr. Wood: You just fell into the trough of the sea?

A. Well, there was a good sea on, but we were far enough away from the center, as he considered, to be safe. We were in the outer edge of it.

Q. I think that is all. Is there any matter, Captain, you want to straighten out, as far as your testimony is concerned at all?

A. Yes. You were asking me yesterday about those monsoon seas, what kind of seas they were. I told you they were a short sea. I think Mr. Wood asked me if the North Pacific sea was worse than a typhoon sea. I said yes, it was a bigger sea.

Mr. Wood: Than a monsoon.

A. I am talking about the monsoon.

Mr. Wood: You just now said typhoon.

A. It was a monsoon sea you asked me—a monsoon sea. I said yes, North Pacific—Atlantic in winter—the sea is a heavier sea.

Court: More dangerous sea?

A. Oh, yes, it is a heavier sea altogether, sir. A monsoon sea is a short sea, continual knock—knock—knock against you; knock three times where a Pacific sea will knock once. That has the tendency of giving the ship the sagging we are talking

(Testimony of Francis W. Cullum.)

about in the cargo more than one big Pacific sea, I think. Do you see what I mean?

Q. Yes. Now there was another matter that occurred to me. You spoke about this water going from side to side, that is the loose water that was in either the ship's hold or bilge or in the tanks. Describe to the court what is the effect of this loose water when the ship takes a roll.

A. She has got the longitudinal bulk-head in her tanks, with the lightening holes, as we call it, holes for the water to run through—when that water doesn't go as fast as the roll of the ship, this extra weight comes on her after she has taken her roll. It gives her a motion like this, or she goes over. That is why they don't have loose tanks, everybody will tell you, the text-books and everything, not to have any loose tanks if you can possibly avoid it in a ship, for that very reason.

Q. Keep ships up tight full of water as much as you can?

A. Yes.

Q. Now, Mr. Wood has been talking a good deal about taking salt water in the tanks. Is that a safe proposition at sea?

A. If you are in a sea it is very unsafe to fill your tanks in a seaway for that very reason.

Mr. Wood: In a storm, you mean?

A. If the ship is moving at all—you have got to give the answer to it—if you fill your tanks at sea if there is any motion in the ship. When I say any

(Testimony of Francis W. Cullum.)

motion, I mean getting on towards a gale of wind, anything like that, moderate sea; where she is rolling around it is a very unsafe proposition, especially in an old ship. You will have a very good chance of breaking the tank-tops, as a roll comes along, because the sudden pressure on the edge of your tank-tops—it is all on the edge of your tank-tops.

Mr. Wood: That is in a gale of wind?

A. I say in a seaway.

Mr. Wood: Seaway means somewhat of a storm, doesn't it?

A. Yes, moderate sea. You can have seaway in a moderate wind, can have seaway in a gale of wind, one thing and another.

Q. You said, I think, in answer to Mr. Wood's question when the cargo was in the ship you could not get at tanks No. 1 and No. 5.

A. In the majority of ships you cannot get at the tanks to clean them out with cargo in the ship. The manhole door is on top of the tanks down in the hold.

Q. Therefore if you put salt water in the tank, what is the difficulty of cleaning it out? Can you just pump it out and pump it in, and pump it out and get it clean so it is fit to drink?

A. Well, pump it in and pump it out, I daresay if you did it often enough you could, but it takes quite a lot of time and a lot of water, and water in a ship, if you have to carry it out to her, if you have

(Testimony of Francis W. Cullum.)

to pump it out three or four times at least, then I doubt if it would be fit to drink.

Q. In other words, there is always some water left in the tank?

A. Yes. You cannot pump it right clean out. All you can do, every time you fill it up again, you are reducing this amount of salt. I don't know—I wouldn't like to say how often you had to put it in and out to get it absolutely fresh for drinking purposes. We generally go in the tank and swab it all out clean and then put water in.

Court: I suppose all the tanks are cleaned when they are in port.

A. Certainly, sir. We open the door and men go inside the tank and swab it, clean them all up—dry them up. They put fresh water in once. Then it is all clean.

Q. If there is salt in the water you cannot keep steam up in your boilers, can you?

A. Oh, yes, you can keep steam up, sir, but the salt water comes right down on the crown of your furnaces, the crown is spoiled, and your boiler is ruined. There is a sediment comes down and forms, and the flame underneath your furnaces won't penetrate that. You heat your plate and the whole crown comes down.

Q. You haven't any power in your boiler?

A. The boiler is ruined for life as a rule.

Mr. Wood: How long do you have to keep that up before that sediment will form?

(Testimony of Francis W. Cullum.)

A. It depends entirely on the density of the salt water you are putting in. There is always a certain amount goes in even in dead fresh water. That is what they clean the boilers out and scale them for every three months.

Mr. Wood: You can use salt water for four or five days, can't you?

A. I am not engineer enough to say. I have never used any salt water. I know all the ships I have ever been in the chief engineers are most particular about their salt water and fresh water, because it is a case of them losing their license if they bring the crown down and ruin the boiler.

Q. Now, Captain, here is one of these hydrographic charts of July. I want to just ask you if this is what you substantially had in mind as to the place of the formation of the typhoons and the directions that they take.

A. Yes. Here is 10. This is made up here. There is none of them made up below 10, you see. This one is made up exactly in 10. This one makes up in 11. See here it comes along here, comes here, follows right up here. This one comes up to China, as I say. Some of them come right across—it hits the coast of Formosa and disperses here. This one recurs. It is made up here. There is none of these recur in the Formosa Channel.

Q. But when the wind comes up in here——

A. They do recur in there.

(Testimony of Francis W. Cullum.)

Q. This is the center of the storm? These lines here indicate?

A. That is the center today, that is the center tomorrow, that is the center next day here.

Q. The wind is 100 to 150 miles each side?

A. Yes. Yes, the big ones are 100 to 150 miles each side. On an average they run 50 miles each side.

Q. They run 100 miles on an average? Here is one that starts to come up in the Formosa Channel and breaks in here.

A. Yes.

Mr. Wood: That is its end, isn't it, Captain?

A. Yes.

Court: That doesn't begin in the Formosa Channel?

Mr. Wood: These red lines indicate typhoon paths in the month of July over a long period of years.

A. Yes.

Mr. Hayden: These, if your Honor please, are the big typhoons; not necessarily, as I understand it Captain, not necessarily the ordinary typhoon.

A. Oh, we get smaller ones they don't put down there at all.

Court: Here is one that comes off here.

A. It comes up, and they recur to the north and northeast.

(Testimony of Francis W. Cullum.)

RE-CROSS EXAMINATION.

Q. I wanted to ask you about these longitudinal sections in the tanks. Would you consider that a vessel without any tight longitudinal sections at all in any of her tanks was seaworthy to carry a full deck cargo on this voyage?

A. Oh, well, yes, she is seaworthy, because nearly all ships used to be built that way, the olden ships. It is only a quite modern invention this longitudinal fore and aft; with the hurry-up of the present day, you don't want to pay so much attention to the stowing of your cargo in a modern ship because if she has a little list you can put water in your tank and bring her up again. That is with the hurry of the present day.

Q. Would she in your opinion be seaworthy to carry a full deck cargo on this voyage?

A. Oh, yes, she would be seaworthy. I couldn't say she wouldn't be seaworthy. That would be condemning the ship.

Excused.

Mr. Hayden: I want to introduce, if your Honor please, survey report made at Bombay by Erickson and Richards, ship and marine surveyors and compass adjusters, of this vessel at the time she was in Bombay.

Mr. Wood: I object to that, your Honor. That is not competent in any way.

Mr. Hayden: If your Honor please, it is quite

(Testimony of Francis W. Cullum.)

competent, and the courts admit survey reports on vessels, foreign survey reports made by regular surveyors. They admit them so far as loading is concerned. I don't know of any particular instance after she has arrived with her load. But a foreign vessel comes into this port with a foreign survey report, showing she is seaworthy, the courts uniformly admit those surveys.

Court: In what condition was the ship when the survey was made?

Mr. Hayden: This report explains the ship had just arrived there in the same condition substantially.

Court: Did she have her load on?

Mr. Hayden: She had her load on, yes. This is a survey as to her stability when she arrived there.

Court: I will overrule the objection.

Exception allowed.

Marked "Claimant's Exhibit N," and read in evidence.

Mr. Wood: Now, your Honor, I don't think that counsel even ought to have read that. It is full of statements that might prejudice your Honor's mind. It is clearly incompetent. I don't know anything about these men or their qualifications. Most of the survey even is made up on reports that they got from the captain that the vessel showed a tenderness during the voyage; that her G. M. was taken at Nagasaki; that she encountered

(Testimony of Francis W. Cullum.)

such and such weather in the Indian Ocean and Arabian Sea.

Mr. Hayden: I don't care anything about that part of the report. That part of it might be stricken.

Court: I will allow the report to go in. I think myself the objection is well taken, but I will allow the record to be made up.

Mr. Hayden: We will probably want to take that deposition.

Mr. Wood: I shall object to that too. This case has been pending for over two years, and they have had ample opportunity to take it.

Court: We will dispose of that when we get through with the testimony.

C. OKUDA, called as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Hayden:

Captain Okuda, how old are you?

A. Thirty-three.

Q. And what is your present occupation?

A. Port captain at Tacoma, Osaka Shosen Kaisha.

Q. That is the owner of the "Saigon Maru"?

A. Yes.

(Testimony of C. Okuda.)

Q. How long have you been with that company, the Osaka Shosen Kaisha?

A. About nine years, eight or nine.

Q. Did you have any special training to fit you for a sea captain in schooling?

A. Yes.

Q. What school did you go to?

A. Government Nautical College in Tokio.

Q. How long a course did you take in that school?

A. Five years and a half.

Q. During that time did you study general seamanship, and particularly anything along the line of naval architecture?

A. Seamanship, navigation, naval architecture, marine law, mathematics; something like that.

Q. You put how many years in doing that?

A. In school?

Q. Making these particular studies that you have referred to.

A. Three years.

Q. And then after that you did what?

A. No, two years and a half in school, two years and a half on sea, and half a year as reserve naval officer, Naval Gunnery School.

Q. What has been your experience at sea?

A. How long?

Q. Yes, and in what capacities.

A. Including the apprenticeship?

Q. Well, including apprenticeship and officer,

(Testimony of C. Okuda.)

so we get at the time you have actually been at sea.

A. About eight years.

Q. And you have held what positions during that time?

A. I have not been captain of a steamer.

Q. Never have been?

A. No; officer—chief officer, second officer, third officer.

Q. But never have been captain?

A. No. I have certificate of captain.

Q. You have what?

A. Have certificate for captain.

Q. You have certificate for captain?

A. Yes.

Q. But never have had command as captain?

A. No.

Q. You are now the port captain for the Osaka Shosen Kaisha?

A. Yes.

Q. How many steamers does the Osaka Shosen Kaisha have?

A. I think about nearly 200 including small steamers.

Q. Do you know what position it holds so far as size compared with the other companies of Japan?

Objected to as immaterial.

A. Steamship company N. Y. K. is biggest one; next Osaka Shosen Kaisha.

(Testimony of C. Okuda.)

Q. They run large steamers as well as small ones, do they?

A. Yes.

Q. You have heard this testimony here, Captain, about this question of deck load on the "Saigon Maru," and you have heard the testimony that in Japan the metacentric height was 136?

A. Yes, sir.

Q. With deck load that she had, with 150 tons of water less?

A. Yes.

Mr. Wood: Less than what?

Q. Than when she was in Portland.

A. Yes, she had more water in Portland than in Nagasaki.

Q. Now, assuming that the weight of the lumber that was loaded in this ship was three pounds to the foot, and assuming that the vessel had a total cargo of lumber of 2,687,450 feet, of which 2,436,850 feet were under deck and 241,599 feet were on deck. Assuming that she had 1200 tons of coal, distributed 500 tons in her deck bunker and 500 tons in her lower bunker, and 250 tons in her side bunkers, and that she had 901 tons of water in her tanks, and assuming that she had a constant of say 160 to 180 tons, what would you say as to whether or not her stability—what would you say as to her condition of stability when she left Portland, with those conditions?

(Testimony of C. Okuda.)

A. I think it was about right as far as tramp steamer is concerned.

Q. What is the stability that is recognized as being a correct stability for tramp steamers, ocean going tramp steamers?

A. I understand that tramp steamer generally must have about one foot and a half or two feet of G. M. height minimum.

Mr. Wood: Two feet of minimum?

A. Yes, that is what some books say.

Mr. Wood: I don't care what the books say. I want your knowledge on it. Captain Yamamoto said one to two feet minimum.

Q. You have taken these courses of naval architecture, you may state what your books say, if you wish.

A. What really my understanding is, when steamer leaving a port she must take in consideration how much G. M. decrease during the voyage. If Captain Yamamoto says one foot, she must have the one foot in, that the minimum during the voyage, not at the time of leaving port, I suppose. So that means they must have the margin of the G. M. height when she is in port.

Court: In port?

A. Yes, when she is going to leave port.

Q. That is so, as she goes across the Pacific and her coal is consumed out of the bottom, she will still be sufficiently stable to stand upright when she gets on the other side.

(Testimony of C. Okuda.)

A. Yes, coal and the water in ballast.

Q. So she has to have more G. M. when she leaves port then, she has to have a margin of safety of G. M. when she leaves port?

A. Yes.

Q. I gave you the figures of about 160 constant to 200 tons of constant. What do you understand that to mean?

A. Yes.

Q. Explain what it is.

A. Of course it means constant tons weight of the steamer. That differs according to the steamer's including stores. That means stores, bilge water, and weight of the crew or the baggage of the crew.

Q. Baggage of the crew.

A. Besides some unknown weight which we cannot calculate.

Q. They fix that for tramp steamers somewhere between——

A. I think it is about 150 to 160, up to 200; some of the steamers 250.

Court: For what?

Mr. Hayden: This constant weight, such as bilge water, that you have to figure on, and stores for the crew, and the weight of the crew and their luggage and baggage, and spare anchor.

Court: 160 to 200 what?

Mr. Hayden: That is tons.

Q. That is tons when you speak of it?

(Testimony of C. Okuda.)

A. Yes.

Q. What did you say you thought the G. M. of this ship was when she left Portland loaded as I described in that question?

A. She had more G. M. in Portland. That is, it means she must have had larger G. M. in Portland than Nagasaki.

Q. Did you figure that out?

A. Yes. 1.67.

Q. 1.67 feet?

A. Yes.

Q. That is what she figured out in Portland?

A. Yes. That is about approximate, because they have no curve, no other items to work out, I think it was about right.

Mr. Wood: Did you make that calculation just here, or did you make it when the vessel was here in Portland?

A. No, because I am not here when she was here.

Mr. Wood: You made it in the last day or two? You calculated that in the last day or two?

A. Here.

Q. You made your figures here?

A. Yes.

Mr. Wood: In the court room here.

A. Court room or hotel.

Mr. Woods: Yes, that is what I mean.

Q. It don't make much difference where you make your figures, does it?

(Testimony of C. Okuda.)

A. I don't think so. I figured before when I was in Tacoma long time, last year in Tacoma; but I figured it again here.

EXAMINATION BY THE COURT:

Q. How did you figure that out?

A. By the formula.

Q. By the formula in your book?

A. Yes.

Q. You have to get your data from the loading of the ship?

A. Beg pardon?

Q. I say, in order to figure that out, you must get the data as to how the ship was loaded?

A. Yes. I know she had so many tons lumber under deck, and so many tons on deck, and her draft board and the beams and the rings, etc.

EXAMINATION BY MR. HAYDEN—Continued.

Q. You took into consideration in making those figures that the draft was 26 foot 6 inches aft and 24 feet forward, or a mean of 23 foot 3, did you?

A. 22-6 forward and 24 feet aft; mean draft 23 feet 3 inches.

Q. You took into consideration the weights of the coal?

A. Yes.

Q. All the weights in the ship?

A. Yes.

Q. And her length and breadth and depth?

A. Yes.

(Testimony of C. Okuda.)

Q. And her metacentric height under those conditions?

A. Yes, I figured out metacentric height Nagasaki.

Mr. Hayden: If the court desires, I will have him put in his calculation, if that would do the court any good.

Court: I suppose that is a calculation that the court may make itself.

Q. You have taken all the data you have used from the testimony that has been introduced here? You have heard it all, haven't you?

A. Yes.

Court: What would have been the difference in that G. M. if they had had 700,000 feet of lumber on deck instead of 241,000 feet on deck?

A. That would make under 1 foot. 700,000 feet on deck, that makes .57.

Court: Would that render the boat unstable?

A. Yes, very unstable.

Q. Did you figure it out for 600,000 feet on deck?

A. Yes.

Q. Will you state what it would be with 600,000 feet on deck?

A. .83. But this one I took the three pound per foot, instead of the 3.35, because if I took the 3.35 dead weight of the steamer don't coincide to the draft of the steamer, because she had $29\frac{1}{2}$ inches more draft when she was in Portland, and her dead weight at 6779, and if you figure out the

(Testimony of C. Okuda.)

3.35, what you call the dead weight for cargo, what you figure out from the dead weight of the ship don't coincide, is not equal to the weight which I figure on by the draft. But if I figure three pounds it makes about the same, about equal.

Q. In other words, figuring lumber as weighing three pounds per foot, her displacement indicates that she would carry 6779 tons dead weight?

A. Yes.

Q. But if you figure it at 3.35 per foot, that displacement is not correct?

A. No.

Q. So that you by reason of figuring out, getting the coincident of the displacement with three pounds per foot, you figure the lumber weighed three pounds per board foot?

A. Not the lumber generally, because the weight of the lumber might differ.

Q. But the lumber that was loaded on board the "Saigon Maru" you figure would weigh about 3 pounds to the foot?

A. That makes about right figure the weight.

Q. That is very close, is it?

A. Yes, because I think 3.35 up to 3.50 would put her down further.

Q. If it had weighed 3.35 or 3.50 per foot she would have been deeper in the water?

A. Yes, she must have been some deeper in Portland.

Q. Did you figure out what the height of the

(Testimony of C. Okuda.)

lumber would be forward and aft on the "Saigon Maru," if you put it to an equal height on both sides of the ship, so as to carry say 600,000 feet on deck?

A. About 10 feet. Not less than 10 feet, I suppose.

Q. Did you figure out what would be the effect of placing the lumber, total of 600,000 feet on deck, the effect on her draft fore and aft.

A. If they put the lumber in the fore and aft equal height, her draft would be more by the stern.

Q. Have you got your figures to show how much more by the stern it would be?

A. About three feet and a half, something like that. Her draft then forward would be 22.85 and aft 26.15.

Q. And what would be the difference in the trim then?

A. About three feet two inches.

Q. In other words, she would be down by the stern three feet two inches?

A. Yes, sir.

Q. Is that the correct way to load a steamer?

A. I don't think it is a good trim.

Q. You wouldn't think that was good trim?

A. But I cannot say absolutely bad for the voyage. It is not good trim, but I cannot say she cannot make the voyage by that trim.

Q. You are only speaking now as far as the trim is concerned?

(Testimony of C. Okuda.)

A. Yes.

Q. Assuming that she has plenty of metacentric height of course?

A. Yes.

Mr. Wood: I cannot see the purport of that question, your Honor. There is no testimony that it was the intention to load this vessel the same forward as aft. It was the intention to put more deck load forward, in height I mean, than aft.

Mr. Hayden: How much more? I tried to find out from your surveyors. I couldn't, so I asked those questions.

Mr. Wood: I think it is in the record several times.

Q. Assuming now, Captain, that you loaded the additional cargo to make 600,000 feet so that the trim remained at 1.6 by the stern, which it was when she went out, how much in height deck load would you have to put on forward, and what would be the height of the deck load on the aft?

A. To make the same trim as when she was in Portland?

Q. Yes. You have given me the figures here. Have you a copy of them, if there was 600,000 feet on?

A. Deck load height on forward deck would be about 11 feet 7 inches, and the after deck would be 8 feet 8 inches.

Q. And did you figure that out with deck load of 700,000 feet?

(Testimony of C. Okuda.)

A. No, that is 600,000 feet.

Q. Yes, but I say did you also figure it out with a load of 700,000 feet.

A. 700,000 feet, the height of deck load on the forward about 13 feet, aft about 10 feet—9 feet 10 inches.

Q. 9 feet 10 inches aft and 13 feet forward?

A. Yes.

Q. Now, that was when she would be still by the stern 1 foot 6 inches?

A. Yes.

Q. Now, did you figure out how much her G. M. would be if you loaded say 500,000 feet on deck?

A. No, I didn't figure it 500,000 feet. But I can figure it.

Q. Captain, what is the area of the forward deck that you figured on in making these calculations?

A. About 3,000 square feet.

Q. And the area of the after deck?

A. 3600—360; 3600, that is allowing the broken space for the drum, for instance, leaving the space for the sounding pipe and the winches or the rigging or the mast or derrick post, which I made allowance of about 10 per cent.

Q. Made allowance of 10 per cent for the rigging, etc. And how many cubic feet per ton did you allow for immersion in making these calculations?

A. Feet of lumber?

Q. No, of water.

(Testimony of C. Okuda.)

A. I think 32 ton to immerse the ship one inch.

Q. In other words, you add 32 ton, you immerse her one inch?

A. Yes.

Q. Is that what you mean?

A. Yes.

Q. Did that work out with the dead weight?

A. Yes.

Court: Does that mean inches of water on deck?

A. No, sir. Of water or cargo or anything, put 32 ton more on, she would immerse one inch in draft.

Court: What?

A. She would immerse—she would sink one inch in draft.

Q. The dead weight that you figured with was 6779 tons?

A. Yes, sir.

Q. Now suppose, Captain, 200 tons of lumber have been loaded on deck and took the place of 200 tons of coal that were loaded on deck, what would the effect of that have been on the stability of the ship when she arrived in Nagasaki, or at the end of her voyage?

A. I figured at Portland first. If she took 200 tons of coal off in Portland, that means she only had 1000 instead of 1200, then the G. M. would decrease .66.

Q. Decrease .66?

(Testimony of C. Okuda.)

A. Yes.

Q. That would make her G. M. what?

A. 1.01.

Q. Then she would be just over 1 foot, if you just figured the coal alone?

A. Yes.

Q. Now, explain to the court how you arrive at that.

A. Arrive at that?

Q. Yes, how you get those figures. Explain to the court what you mean by starting out from here with 1000 tons instead of 1200 tons of coal; and I assume, Captain Okuda, that you are not figuring the deck load at all on that?

A. No.

Q. Same deck load that she had?

A. Same deck load and same ballast tanks.

Q. Same deck load and same ballast tanks, only you have 200 tons of coal less?

A. Yes, in deck bunker. The 200 tons less coal means she had 300 tons of coal in deck bunker, because you have deck bunker capacity of 500 tons.

Q. Yes.

A. So after leaving Portland, assuming she would consume those 300 tons of coal first, she would have gone down over the bunker, and meantime she is using the water in tanks in the bottom.

Q. At the rate of 12 tons a day.

A. Yes. So for the first 8 days her G. M. height would increase because she consumed more weight

(Testimony of C. Okuda.)

of coal in deck bunker; that means above the center of gravity of the steamer; weight of the coal is more than the water in ballast tank.

Q. In other words, you are consuming more weight of coal than you are consuming weight of water?

A. Yes, and more coal above the center of gravity.

Q. Than you are weight of water below the center of gravity.

A. Yes.

Q. Therefore the balancing——

A. Make the G. M. higher.

Q. Make the G. M. higher.

Mr. Wood: You are consuming about 32 tons of coal to 12 tons of water, aren't you?

A. No. Because if I understand she had only 250 tons of coal left at Nagasaki, when she got at Nagasaki. That means she consumed 950 tons during the voyage between Portland and Nagasaki. 1200 tons minus 250 equals 950 tons. That means daily consumption of coal between Nagasaki and Portland was $36\frac{1}{2}$ tons.

Q. Yes, well, the general effect would be about the same if she consumed 32.

A. I don't think much difference.

Q. You don't think there is much difference?

A. No.

Recess until 2 P. M.

(Testimony of C. Okuda.)

Portland, Oregon, December 19, 1919. 2 P. M.

C. OKUDA resumes the stand.

DIRECT EXAMINATION—Continued.

Q. Captain, going back just a moment I asked you if you had figured out what the G. M. would have been at Portland if you had a total of 500,000 feet on deck, all the other conditions being the same. Have you got your figures there?

A. 500,000 feet of lumber on deck.

Q. Yes. What would be the G. M. at Portland, all other conditions being the same?

A. I figure G. M. would decrease about .6.

Q. That would be 1.06?

A. No, decrease .6. That means the G. M. would be 1.07.

Q. 1.07?

A. Yes, about.

Court: That is with 500,000 feet on deck?

A. Yes, in total.

Q. Did you figure it out for 400,000 feet?

A. That makes G. M. about 1.09.

Q. And for 300,000 feet?

A. 1.53.

Q. And for 241,000 you said it was 1.67, I think.

A. Yes.

Q. So as you reduce the weight on deck you increase the G. M.?

A. Yes, if you reduce the weight on top it means to lower down the G. M., the gravity of the ship.

Q. Yes, lower down the center of gravity?

(Testimony of C. Okuda.)

A. Yes.

Q. Right here, while we are on that, you might state to the court what the center of gravity is, what the center of buoyancy is, and what the G. M. is.

A. The center of gravity of the ship is the center of gravity of the steamer or the ship including the cargo, machinery, water, everything. It means the center of the total weight of the ship. The center of buoyancy is, you might say, the center of the weight of water which is displaced by the ship.

Q. Yes, and the G. M. is what?

A. The G. M. is the distance between the center of gravity and the metacenter of the ship.

Court: And the center of displacement?

A. No, metacenter.

Q. What is the metacenter?

A. Metacenter is the point, when ship heel over to either side, then the center of buoyancy would move toward the sides where the ship heeled. Then the perpendicular line through the B.

Q. That is center of buoyancy?

A. Yes, center of buoyancy, through the quarter—

Mr. Wood: Why not let him draw it on the blackboard?

(Witness draws diagram on blackboard.)

A. Suppose the center of buoyancy were here, this is waterline, where ship heel to starboard side. When she is upright supposed to be about here, center of buoyancy (referring to diagram), and the G. here. Then when she heeled over to this side, we

(Testimony of C. Okuda.)

must move somewhere near here for the center of buoyancy. But the G don't move to anywhere, because the G is stationary. Then we put the straight line and through the B thus, this line, too, and the G. M. of the steamer push it down more by the weight.

Court: It brings the M down toward the G?

A. Yes, different according to the position of the G?

Court: The G is stationary?

A. The G is stationary certain condition of the ship. If you put more weight on, the G will raise.

Mr. Wood: What the court means is that with the load and the ballast and the coal all the same, G remains stationary.

A. Yes.

Mr. Wood: And as the vessel moves over to one side or the other, the B moves?

A. Yes.

Mr. Wood: What is M?

A. M means the point where the two come together, and this is what we call GM, this we call BM, and the coupling rightening lever.

Q. Where do you figure that?

A. We figure rightening lever here. It has a tendency to pull down.

Q. And the B a tendency?

A. To push up. Then this is the lever of the moment; it has more tendency to bring her up in right position.

(Testimony of C. Okuda.)

Mr. Wood: The more she heels over, the longer the lever becomes?

A. No—10 to 15 degrees—we figure out this GM by the GM——

Mr. Wood: If the ship heels over a little more, the center of buoyancy becomes something like that, doesn't it? B would move over there, if the ship got in that shape?

A. Yes.

Q. Then if the center of buoyancy moves over here, the righting lever is greater, isn't it?

A. It seems greater; speaking simply seems like greater; the power of the rightening lever would increase; but when she got a certain maximum amount over, then it would not increase.

Mr. Wood: After she is over on her beam ends?

A. No, not after she is over on her beam ends.

Mr. Wood: Well, near her beam ends?

Q. This is reasonably reliable up to a list of 12 degrees?

A. Yes.

Q. After that you need more details?

A. More details.

Q. To figure the submersion area?

A. Yes.

Q. That is the wedge of submersion?

A. Yes.

Q. And if she gets over too far, of course, the

(Testimony of C. Okuda.)

center of buoyancy and the center of gravity get so that there is no righting power at all?

A. Yes.

Court: Now, you have been talking about various distances?

A. Yes, suppose G is stationary, would have been stationary for same condition of load; but if you put more lumber on deck, that means we put more weight above the G, so the G. have to move upward.

Q. To get to the center of the weight?

A. Yes. The weight of the bottom reduced, it means same thing—more weight up.

Q. If you take the water out of the bottom the weight moves up?

A. Yes.

Court: Well, now, if the G moves up with the heavy weight on top, what action does the meta-center take? Will that go down to meet the gravity center?

A. No, I don't think so; not much difference of draft.

Court: What I am getting at, you have described various loads on the deck here, and you have described the difference between, I think, the metacenter and the gravity as 1.69, then you get down less than one. What do you mean by that? How can you illustrate that?

(Witness illustrates on blackboard.)

Q. I take it, Captain, if the ship is the same

(Testimony of C. Okuda.)

breadth—two ships the same breadth or the same ship the same breadth—and you put more cargo on deck, your G rises, but your M stays about stationary?

A. Well, about stationary; small movement the deeper your draft.

Q. If there is a big difference in draft, then the M changes some?

A. Oh, yes, it changes.

Q. Now, Captain, I think that we had this problem before us just before we went away at noon time. The question was, assuming that there was the same quantity of lumber on deck when the ship left Portland and say 200 tons less coal.

A. Yes.

Q. What would be the effect on the stability of the use of that coal as she progressed towards her port in Japan?

A. This morning I forgot to tell the court, if you reduce the amount of the coal in deck bunker, that means lower down center of gravity is below former position, because deck bunker is higher than center of gravity of the steamer.

Q. The coal is above the center of gravity of the steamer?

A. Yes.

Q. So that if you take off 200 tons of that you lower the center of gravity?

A. Yes, lower it.

Q. Now, then, assuming you are using coal from

(Testimony of C. Okuda.)

the bottom of the ship on the way across at the rate of 32 tons a day, and you are using water from the tanks at the bottom of the ship at the rate of 12 tons a day, will you explain to the court how that would affect the stability of the ship at the other end?

A. The other end?

Q. Yes, of the voyage.

Court: You mean at Nagasaki?

Mr. Hayden: Nagasaki, I mean, yes.

A. When the ship consumed 950 tons of coal between Portland and Nagasaki and consumed water at the rate of 12 tons a day the G. M. would decrease .66, but before that, when she was at Portland and reducing 200 tons of coal in deck bunker, that increased G. M. about .25.

Mr. Wood: What would the G. M. be under those conditions?

A. G. M. at Nagasaki or at Portland?

Q. At Portland if you increased it as you have stated.

A. 1.92.

Q. What would it be at Nagasaki?

A. 1.26.

Q. Now, Captain, take the ship as she was with 500 tons of coal on deck and consuming 12 tons of water a day and 32 tons of coal—you haven't figured it on the basis of 32 tons?

A. Figured it on the basis of $36\frac{1}{2}$.

Q. Well, I suppose the figures are very much

(Testimony of C. Okuda.)

the same in principle—illustrates the situation, does it?

A. I think so, yes.

Q. Assume, then, that she uses $36\frac{1}{2}$ tons of coal a day and 12 tons of water a day, she leaves here with 500 of those tons on deck, the same quantity of lumber, explain how the G. M. is affected as she goes across, using this deck coal, that is, using the coal out of the bunkers when the deck coal is taken down to replace the coal that is used out of the lower bunkers.

A. You mean to lower down the coal in deck bunker into the hold?

Q. Yes, you lower it down as you use it?

A. Yes.

Q. And you also decrease the water as you use it?

A. Yes.

Q. Assuming that you have some coal left.

A. Yes.

Q. State whether or not that condition of having the 500 tons of coal on deck is better for the ship than though you didn't have it on deck when you left.

A. Because when she had more coal on board the steamer, that is, you would have more remaining coal when she approached to her port. That means she would have more weight in the bottom. But if she consumed all coal which she had on deck on board, they have consumed all coal during the

(Testimony of C. Okuda.)

voyage, or may leave about 20 or 50 tons—I don't know how much would probably remain—but comparing those conditions, if she had more coal in the bottom, that means more weight under the center of gravity, that means lower the center of gravity.

Q. Make the ship more stable?

A. Yes.

Q. If she burns all her coal out going across, the ship is less stable?

A. Yes.

Q. But at the same time she is burning all her coal out she would be using her water out?

A. Yes.

Q. Now, for the time the coal is above the center of gravity, and she is using water out below the center of gravity—

A. Yes.

Q. She is burning out more coal than she is water?

A. Yes.

Q. How will that affect the center of gravity per day?

A. I think it would be about, up to 7 or 8 days, she would gradually increase G. M. after leaving Portland; but after 7 or 8 days her G. M. gradually decrease on the way to Nagasaki.

Q. And the reason for that is that the coal is higher and you are burning more of it than you are using water?

A. Yes.

(Testimony of C. Okuda.)

Q. In other words the center of gravity of the coal that you are consuming is above the G. M., and that coal weighs more——

A. Not above G. M.; above G.

Q. Above G.?

A. Yes.

Q. And that coal weighs more than the water below that is being consumed?

A. No, not basis of that. The distance to the center of gravity of the coal and the distance to center of gravity of the water in tank; that is the difference.

Q. That is, the distance is what you call the moment—the moment of weight?

A. Weight multiplied by distance is called moment.

Q. That is on the theory of a scale, is it not; you have say a pound a foot from a center point, and then move it out two feet, that pound weighs twice as much—that is the force of the pound is twice as great at two feet away as it was when it was only one foot away.

A. Yes. For instance, take the pencil; if the supporting point of this pencil stopped right here, it is not here truly what the proportion, and put the same weight above end, then the moment for this end would be distance from this point to this multiplied by weight which are on it, and moment of this end weight multiplied by distance from supporting point to the end.

(Testimony of C. Okuda.)

Q. So that is the same effect, that is the way you figure the water and figure the coal?

A. Yes.

Q. Get the center of gravity of the amount of coal that is used each day and the center of gravity of the amount of water that is used each day.

A. Yes.

Q. Or better, what is left each day.

A. Yes.

Q. And multiply that by the distance above and the distance below the center of gravity.

A. Yes.

Q. Which gives you the moment of weight.

A. Yes.

Q. And you have to balance those; that is, the center of gravity has to move up or move down so that it balances between those two in order that there shall be a static condition.

A. Yes.

Q. Would you say this ship would be in a better or worse condition to make this voyage if she had loaded less coal at Portland and put more lumber on deck?

A. Oh, it would be worse if you put more lumber on deck and reducing the amount of coal. No——

Q. Yes, that is right, putting more lumber on deck and reducing the quantity of coal.

A. I would have to figure out the moment for the center of gravity of the ship.

(Testimony of C. Okuda.)

Q. But your lumber is always constant.

A. Oh, yes, sir, throughout the voyage.

Q. And her condition then on her arrival at Nagasaki would be worse, you say?

A. Yes.

Q. Because the weight of the lumber remains constantly on the deck?

A. Yes.

Q. Whereas the weight of the coal, that is disappearing all the time.

A. Yes.

Q. Did you figure out what would be the height of the lumber on the forward deck if the ship were loaded so that she was on an even keel?

A. To make her even keel you have to take 157 tons from forward deck.

Q. 157 tons?

A. And if you put 157 tons of lumber on forward deck only, it makes 9 feet high on forward deck.

Q. Nine feet high?

A. Yes.

Q. Or higher?

A. No, no; high; not higher.

Q. Nine feet high?

A. Yes, from the main deck.

Q. And at three feet to the ton there are 746—

A. About 111,000 feet; something like that. I don't remember exactly now.

(Testimony of C. Okuda.)

Q. Three pounds to the foot, the board foot, makes 746 board feet to the long ton?

A. Yes, about. I figure 157 tons of lumber 117,230 by 3-pound basis per foot.

Q. In other words, to put this vessel on an even keel, if you load 117,230 feet forward you will then have the vessel on an even keel?

A. Yes.

Q. And the height of the forward deck load will be nine feet about.

A. Yes.

Q. Now, what is the effect upon the navigation of a ship in a wind with that much deck load exposed forward as against the deck load to the rail aft?

A. I don't think it is as good for the steering of the steamer.

Q. Why?

A. Suppose she had more against the wind comparing the after deck.

Q. And that does what with the ship?

A. That makes her steer hard, of course, blow by the wind all the time, you see then the wind force have tendency to draw her bow to leeward.

Q. And that does what with the ship?

A. That makes her steer hard.

Q. And it may do what in a big storm?

A. Oh, big storm.

Q. Yes. It may do what with the ship in a big storm with that condition?

(Testimony of C. Okuda.)

A. I think it is very hard to keep her, to make a proper maneuver.

Q. In what way do you mean by a proper maneuver?

A. Sometimes according to the position where she is for the center of the storm, you have to maneuver a ship, because scudding or hove to—scudding means to have the wind from quarter; hove to means hugging to the wind from the bow, either the port or the starboard, according to the position of the steamer against the center of the storm. If she had the good steer you are all right, but if she don't have the good steer in that case she might get poop down with heavy sea.

Q. She might get poop down?

A. Yes.

Q. What do you mean by that? The waves running on to her poop, eh?

A. Yes.

Q. And if she were trying to get into the wind—

A. You mean hove to?

Q. Hove to into the wind, what would be the effect of the wind on her staying in that position, if the cargo were high on the forward deck and not high on the after deck?

A. I don't think it is—could heave to.

Q. You don't think you could come to?

A. No.

Q. Well, then, will she fall off into the trough of the sea?

(Testimony of C. Okuda.)

A. It might be.

Q. That would be the tendency anyway?

A. Yes.

Q. Would you say, as a man who has charge of the loading of ships, that that would be the proper condition for her to undertake this voyage in, with a deck load forward of 9 feet and after deck load of 4 feet 6 inches?

A. I don't think it is good for the steamer.

Q. Do you think it would be the proper way to load the ship if she had her deck loads even fore and aft, and she were down some 3 feet 6, I think you said, by the stern?

A. I think so, if you have to take more lumber.

Q. You think that would be better than to have her the other way?

A. If you have to take more lumber, if the conditions, other conditions allow.

Q. Well, now, the lower she is by the stern in the water the more difficult it is for her to rise out of the seas if they are following, is it not?

A. Yes, she might have more chance—she might be more danger for her to be poop down because the stern is more deeper than the bow; yes, too deep.

Q. You have sailed these China Seas, have you?

A. Yes.

Q. Before we go onto that question, Captain, was there anything else in your mind that I have

(Testimony of C. Okuda.)

not asked you about this metacenter and these figures, that you want to speak about?

A. No.

Q. That you think ought to be spoken about in connection with this case?

A. No.

Q. Where has your experience in navigation taken place, Captain, that is, the actual practical sailing of ships, and in what waters?

A. Sailing ships?

Q. Sail or steam ships, taking you into what seas and waters mostly.

A. I was about two years and two months in sailing ship and once went from San Diego to Valparaiso, Chile, came back to Japan through Hawaii, and made next voyage from Japan to Tahiti, then down around Cape Horn, and then go to Cape Town, then went to Cape Town, then up to Melbourne, Australia, then went back to Japan, making the circumnavigation of the world. That is the only two voyages I made when I was on sailing ship. Steamer between Bombay and America.

Q. How long on that route?

A. I made about 16 or 17 trips between Hong Kong and United States; some coast of the United States; sometimes San Francisco—mostly Puget Sound. Six or seven months from the coast of Japan to Formosa. About two trips to Bombay from Japan, from February to January, I suppose.

(Testimony of C. Okuda.)

Q. Well, you have been sailing the China Sea during the month of July?

A. Monsoon?

Q. No, I say have you sailed in the China Sea during the month of July?

A. I think so, but I don't remember how often I did.

Q. Have you sailed into Bombay during the southwest moonsoon period?

A. Yes.

Q. Will you describe just generally the conditions prevailing during the southwest monsoon period, crossing the Bay of Bengal and up to Bombay.

A. We have southwesterly wind and heavy sea.

Q. How does that sea strike the ship?

A. The sea comes about the same direction during the monsoon season to the effect the ships roll over.

Q. And strikes the ship how?

A. Monsoon comes about same direction, you see, so it strikes the ship all the time same side of the ship; from Singapore to Bombay they strike on the port side.

Q. Port side?

A. Yes.

Q. And are those winds always steady?

A. Steady in direction, but they differ in force.

Q. Are they what you would call summer breezes or do they get to be more than that?

(Testimony of C. Okuda.)

A. Mostly force about 6 or 7, sometimes up to 8; sometimes might be 5.

Q. Now, do you know the general character of the typhoons that might be encountered in the China Sea on a voyage leaving here in June, the fore part of June.

A. Yes, I think they anticipate she might have typhoon in China Sea, because 4th of July, because more frequent than other months.

Q. In making that voyage, as a navigator, would you figure that your ship might be caught in one of those typhoons at that season of the year?

A. I think that captain must have in mind when he was going to leave the port expect some typhoons, and to have his ship safe—safe enough for any storm.

Q. Is that season of the year considered a bad season of the year for shipping in those waters?

A. Bad season of the year in China Sea.

Q. Can you describe from your own experience the general condition of the sea and wind during one of those typhoons?

A. Well, fortunately I don't meet big typhoon in my experience; but have met moderate typhoon when I was on board steamer.

Q. Is there any way of telling whether you are going to meet a big typhoon or moderate one in advance?

A. No. Generally typhoon supposed to be an-

(Testimony of C. Okuda.)

anticipated by the barometer, or the direction of the wind.

Q. No, I mean when you start out from a place like Portland, in going through those seas in June, can you anticipate in advance whether you will meet a severe typhoon or a big typhoon or a moderate one?

A. No, I don't think so.

Q. They are apt to come at any time, are they, big ones?

A. They are.

Q. There is no way you can figure that out then?

A. No.

Q. What is the area of the typhoon across it, generally speaking?

A. The area of the typhoon, they vary according to the typhoon, because some typhoon covers more area, and the more breaking for her width, which means very low barometer of the center, so you can't say what the area of the cyclone is.

Q. Well, is it reasonably possible for a ship to get out of those cyclones when they are in the China Sea, or do they often have to face them?

A. Oh, I think that would depend upon her position on the sea.

Q. When the cyclone happens to come along?

A. Yes; yes, that is right.

Q. You say you have never been in a real severe typhoon, a big typhoon?

A. No.

(Testimony of C. Okuda.)

Q. You have been in moderate typhoons?

A. Yes.

Q. In a moderate typhoon, would you consider, if you were loading this ship, that it was safe, with steering rods exposed, to take more deck cargo than she had aft, that is up to her rail?

A. The same construction of the steering rods of the "Saigon Maru"?

Q. Yes.

A. If I were the captain I don't think.

Q. If you were, as port captain, overseeing the loading of the ships belonging to your company, would you permit him to take any more?

A. No, I wouldn't expect to ask the captain to take any deck load on such a steamer.

Court: Take any deck load?

A. Oh, might take some; but it is very dangerous to take any above the rail.

Q. I asked you, Captain, about the forward deck being high, say 9 feet high, and the after deck only having lumber up to the rail, and you didn't answer the question quite clearly to me. I asked you how you would maneuver your ship, or if you could maneuver your ship in one of those typhoons. I don't want to ask you a direct question, but I wish you would go over that answer once more, if you will, please, about the difficulties under those circumstances of holding the ship up into the wind and sea and scudding away from it.

A. If she have to heave to, for steering act—

(Testimony of C. Okuda.)

Q. Power to steer?

A. Yes, keeping the steering power.

Q. Steering power, yes. That means power to control her by the rudder?

A. Yes, to control her by the helms—rudder. But when higher deck load on forward deck, that means more area which is exposed to the wind. So when she has got heave to, that means they have the wind from bow, either port or starboard. If she has more exposure on the forward deck, it means make very hard to steer, because when the wind would blow, wind having more area on the forward deck comparing on the after deck, blow down to the lee-ward, it means more tendency to expose her beam to the wind. That means to have more tendency to get into trough of the sea.

Q. Is that the proper position for a ship to be in for safety in a big gale?

A. No, I don't think so.

Q. Do you know whether it is or not? Do you know?

A. Yes, I know.

Q. You know it is not?

A. Yes.

Q. Captain, in your experience with vessels of substantially the size of the "Saigon Maru", have you had any experience with such vessels going across the Pacific?

A. Yes.

(Testimony of C. Okuda.)

Q. Do you know about what amount of coal they uniformly take on that voyage?

A. I have many chartered steamer of this line since I came here.

Q. That is, your line charters other people's boats?

A. No, we charter.

Q. Your line charters boats belonging to other people?

A. Yes. That means tramp steamer, and I think I remember they took about 1100 or 1200 tons in Tacoma.

Q. In Tacoma?

A. Yes.

Q. For where?

A. To Japan. Sometimes Yokohama or Kobe.

Q. Is that the uniform regular amount that the steamers take?

A. That is common for our company.

Q. Is it common to your company too?

Mr. Wood: No, it is all he said, it is common to his company.

Q. I say, is it common to your company too as well as chartered ships?

A. Chartered ships.

Mr. Wood: He calls his own chartered ships?

A. Tramp steamer which belongs to our company, in other words, belongs to other company.

Q. Do you provide the amount of coal for the steamer; that is, determine how much coal belongs

(Testimony of C. Okuda.)

to the tramp or chartered steamer; or does the captain determine the amount of coal he will take on the chartered steamer?

A. The captain usually ask me how much coal he want, and we recognize according to captain's opinion; that is all—supply the coal.

Q. You furnish the coal according to the captain's opinion?

A. Yes.

Q. Does that apply to these chartered steamers?

A. Yes.

Q. And does that apply to your own steamers?

A. Yes.

Q. So captains on chartered steamers and captains on your own steamers take 1100 to 1200 tons to go across the Pacific?

A. Yes.

CROSS EXAMINATION.

Questions by Mr. Wood:

Q. Captain Okuda, when you were figuring the GM, what weight of water did you figure in the ship?

A. You mean?

Q. When you were figuring her GM as she left Portland?

A. 900 tons; 901 ton.

Q. 901?

A. Yes.

Q. The reason I asked you is I thought the testimony showed she had 883 tons. Can you explain

(Testimony of C. Okuda.)

the difference? I don't know that I am right. Maybe you are right.

A. Because if she had full of water in her ballast tank, after peak tank, and the fresh water tank, her total amount of water must be 900 ton.

Q. It would make quite a difference, wouldn't it, if there was only 883 tons; make some difference in your calculations?

A. Yes; that makes the GM more smaller.

Q. I don't want to prolong this, if you can explain how the 901 tons comes in.

Mr. Hayden: I think we just took the capacity of the tanks full.

Mr. Wood: I see what he did now. After he says 883 tons in this deposition, he adds 18 tons in a little extra tank. All right; so much for that.

Q. Now, Captain, when they were testing the stability of the vessel in Nagasaki at this biggest ship-yard in Japan, they used an inclining experiment?

A. Yes.

Q. The log-book shows that they had a traveling weight, and they inclined the ship with that weight?

A. Yes.

Q. And as I understand it they figured the GM with the aid of that experiment? Is that right?

A. Yes. That is the GM was calculated by the experiment, yes.

Q. That is on page 53 of the log, if you want to refer to it. And in this certificate of the Bombay

(Testimony of C. Okuda.)

surveyors, it closes with this sentence: "We did not determine the GM as it being monsoon season and vessel lying in the harbor too high a sea was running."

A. Yes.

Q. Evidently both these Bombay surveyors and the Japanese shipyard thought that they would have to experiment with the vessel directly in order to correctly calculate the GM. Do you understand me?

A. No, I don't catch that. You mean Bombay surveyor?

Mr. Hayden: Mr. Wood, maybe I can help this out a little bit. He is only figuring after the GM is once obtained. He takes that as a definite figure. He doesn't try to determine the GM originally, but given the GM, a certain draft and certain loads, then he calculates the differences in the GM.

A. Still water.

Q. He must have still water to calculate the GM?

A. Yes.

Q. So all of your calculations about the GM take the GM of 1.36 as established at Nagasaki as a basis?

A. Yes.

Q. And from that are you satisfied now that your varying GM's that you have calculated under different conditions are correct?

A. Yes, I think so. I believe so, so far as my knowledge goes.

(Testimony of C. Okuda.)

Q. Well, I only want to test your own feeling about it, because you are the only witness, you see, that we have on that point.

A. I have no way of finding out the GM without the GM at Nagasaki, because I have no chance to examine the GM myself.

Q. Could you figure for me how much lumber the vessel would have on deck with GM of one foot? You haven't given that yet.

A. Yes, I think I can.

Q. Take a long time or not?

A. Ten or fifteen minutes or so.

Q. I think I will ask you to do that later and hand it in.

A. Yes. At Portland?

Mr. Hayden: Is that GM one foot at Portland?

Mr. Wood: Yes.

A. At Portland. The same coal and ballast.

Q. I would also like with GM one foot how much lumber there would be at Nagasaki; one foot GM Nagasaki how much lumber on deck; the same at Portland.

A. Yes.

Mr. Hayden: Instead of figuring back from the GM of 1.36 at Nagasaki, you want him to figure back reducing the GM at Nagasaki to one foot?

Mr. Wood: And how much lumber that would have allowed on deck.

Mr. Hayden: It would allow the same at Naga-

(Testimony of C. Okuda.)

saki on deck with GM at one foot as it would at Portland.

A. The GM must be less at Nagasaki.

Mr. Hayden: It would be less if you burned your coal, etc., from her.

A. Yes.

Mr. Hayden: I think what you have in mind is starting out here with GM at one foot, what would GM be at Nagasaki with consumptions he has already calculated from.

Mr. Wood: Well, do it that way.

A. Do it right now?

Q. Oh, no. I will let you hand it in. Now all your calculations are based on a coal consumption of about 36 tons a day?

A. Yes.

Q. I call your attention, however, that the captain has testified he would consume about 32 tons a day of American coal.

A. American coal.

Q. Yes, that is what he said.

A. But I don't know what you call that. The captain had 250 tons of coal at Nagasaki, and she took 1050 tons more coal at Nagasaki, that makes 1300 tons altogether, and her bunker capacity is not more than 1300 tons.

Q. Did you ever sail on the "Saigon Maru" yourself?

A. No. I was on board.

Q. Did you ever make a voyage on her?

(Testimony of C. Okuda.)

A. No.

Q. Did you ever carry lumber cargoes including deck-loads?

A. Full cargo?

Q. Yes.

A. No. But we took some deck-load of lumber for the Orient, steamer having general cargo underneath in her hold, but not having full cargo of lumber.

Q. That is quite a different condition.

A. Yes.

Q. Did you say whether you had ever been in a bad typhoon?

A. No, sir.

Q. You never have?

A. No bad typhoon, heavy typhoon.

Q. You never have been?

A. No. But the typhoon of the China Sea they come even Japanese—Japan too, you see; so when I was living in Japan I experienced the rain, how heavy it is.

Q. Do vessels make voyages with a GM of less than one foot?

A. No, I don't think so.

Q. You don't know?

A. I don't think they will make a voyage having GM under one foot, because naval architect say the captain of the steamer should have one foot on up to two feet.

Q. Now, Captain, Mr. Hayden asked you a good

(Testimony of C. Okuda.)

many questions about the stability of the vessel getting worse as she continued on her voyage, due to the coal consumption.

A. Yes.

Q. It is true, is it not, that the usual way of burning the coal is of course to use the coal from the bottom bunkers, but keep filling the bottom bunkers all the time from the top? That is right, isn't it?

A. Not entirely, because to shove it down bunker must have some space in the lower hold for free passage through the trimming hatch, you see. For instance, when she was full of coal in bunker, 'tween deck and deck bunker, then there is bound to be some coal in her lower hold at first, make passage into the 'tween deck to send up men to 'tween deck, you see.

Q. You don't have to send up men at first, the coal comes down itself at first?

A. Yes.

Q. And as soon as it stops coming down then you can send up men to shovel it down?

A. Yes.

Q. So you could always keep your lower bunkers full. That is right, isn't it?

A. Not quite full.

Q. Well, almost full. That is right, isn't it?

A. Yes.

Q. So if you leave Portland, let us say, with 1200 tons, as this ship did.

A. Yes.

(Testimony of C. Okuda.)

Q. And you continue on the voyage, the coal keeps being lowered.

A. Yes.

Q. And if there were no water being consumed, the stability of the vessel would get better all the time clear to the end of the voyage, wouldn't it?

A. You mean—

Q. If there were no ballast water being used up?

A. No—yes.

Q. I am right?

A. Yes, if no water consumes in the bottom.

Q. Yes, and the coal being used and always working down, her stability would get better all the time?

A. Yes.

Q. But that is somewhat counterbalanced by the fact that her ballast water is used?

A. Yes.

Q. If a captain is anxious to carry a full and proper cargo, he can, as he uses up ballast water out of No. 3, he can then, as Captain Cullum described, empty the water from No. 1 into No. 3?

A. Yes.

Q. And he can fill No. 1 with salt water then, if he has to, can he not?

A. Oh, you might fill up ballast tank, No. 1 tank, between Nagasaki and Portland, but she have to go from Nagasaki to Bombay, and perhaps about the

(Testimony of C. Okuda.)

same distance from Portland to Nagasaki as from Nagasaki to Bombay.

Q. He can get water at Singapore, get water at Colombo if he has to?

A. If there is an agreement between the owner and the charterer, have the authority to get water at Singapore or Colombo.

Q. This ship did coal at Singapore?

A. Yes.

Q. Let me put it this way, will you, Captain, shortly?

A. Yes.

Q. From Nagasaki to Bombay he passes a number of coaling and water ports, so that none of the passages on that voyage need be longer than say 14 days.

A. If allowed to coal at different port.

Q. If the owners will let him go in there?

A. Yes.

Q. If the owners will let the master go in?

A. Yes, if the owners will stand for the loss, the expense to go into port.

Q. Now, I want to come back a little to where we started. He can put salt water in No. 1 ballast tank unless he has to save it for fresh water leaving Nagasaki?

A. I don't quite understand what you say. You say he might put salt water into No. 1 ballast tank?

Q. Yes, after he has emptied No. 1 tank of fresh water.

(Testimony of C. Okuda.)

A. If he was allowed to go into port to take fresh water?

Q. Yes.

A. I think so.

Q. So by conserving his water—you understand what I mean?

A. Yes.

Q. Being saving of his water, and using salt water as I have described, the stability of his vessel because of the consumption of water will be about balanced by the increase of stability due to the coal being lowered, won't it?

A. Yes, it should be.

Q. You understand from this testimony, don't you, that this 61½ tons of water that was used a day for drinking and culinary uses and washing, and so on—

A. Yes.

Q. Is that a normal amount or is that a large amount?

A. I think that normal amount in summer time.

Q. You think that is not enough. It seems very much to me?

A. Got about 50 crew, I suppose, and Japanese—

Court: How many?

A. 50. And Japanese they cook their rice, you see, they have to use a lot of water, and wash their rice, so Japanese use more water than the American.

(Testimony of C. Okuda.)

Q. Do you know whether the "Saigon" had a condenser and evaporator?

A. I don't think so.

Q. You don't know?

A. But I can't tell sure, but I don't imagine—I can't imagine such a vessel having an evaporator. She would have a condenser but no evaporator.

REDIRECT EXAMINATION.

Q. Now, Mr. Wood asked you if there was no water used if the stability of the ship would not get better all the way across by using the coal? Think of that question and answer it again, will you?

A. Suppose she doesn't use any water?

Q. Suppose she doesn't use any water and only uses the coal going across.

A. I told Mr. Wood generally I suppose you have some coal when she get in port.

Q. You had in mind then that she had some coal left when she got into port; but if she didn't have any coal left when she got into port then what?

A. I think she would be a little better.

Q. A little better?

A. Yes. Suppose you have deck bunker is up above center of gravity.

Q. You think she would be getting better all the time?

A. Yes.

Q. It is impossible to make a trip across the ocean without using water, isn't it?

(Testimony of C. Okuda.)

A. Sure.

Q. So is it customary, Captain, in making trips from Nagasaki to Bombay to stop in at these various ports and take water?

A. No, I don't think for the purpose only to take water.

Q. They don't stop in to take water at these various ports as a general rule, do they?

A. No. But when they have request by the owner to call such and such port they have to do it.

Q. But I mean, it is not the customary thing when you are figuring on chartering a vessel, to think that that vessel is going to lose time by going into these various ports and taking water, is it?

A. Sure, if you call various ports to take water or coal, charter rate must be higher, because it will lengthen the time of the voyage, might increase danger of navigation in and out of port.

Q. The usual method in making that trip would be to stop at Nagasaki and then go on to Bombay, would it not?

A. Yes.

Q. Possibly calling at Singapore. You have told me this, Captain, that the call in Singapore was required for some reason. Will you tell me what that reason was.

Mr. Wood: I don't see how he can possibly know this of his own knowledge.

Mr. Hayden: I will tell you what it is. There were government regulations at that time—it was

(Testimony of C. Okuda.)

the time when the German cruisers were loose down there in the Indian Ocean—and the government required that they call in there for instructions.

A. I think at that time—1917 or 1916?

Mr. Wood: This was 1917.

A. 1917. They call at Singapore to get the necessary instruction from the Naval Engineer officers of England, to see about the German raiders, which coast should be taken to avoid danger of the German raider, or German cruiser, or the submarine.

Court: This ship, as a matter of fact, did take water at Singapore?

A. Is that so?

Mr. Wood: It took coal at Singapore.

Court: That is what I was inquiring.

Mr. Wood: That is stated by the captain.

Mr. Hayden: I will look at the log, which has been introduced in evidence here, and see. If he had taken coal at Singapore, he would have shown that in his log-book, wouldn't he, as a regular matter of business?

A. Sure. I think the captain made a mistake on the coal—on the call or the coal.

Mr. Wood: I don't think so, Captain.

A. Because Captain Yamamoto told me when she came here she stayed only four hours to get instruction from the naval officer.

Mr. Wood: At Singapore?

A. Yes.

(Testimony of C. Okuda.)

Mr. Wood: Well, here is what he says. He is talking about coal all the time.

A. So I don't much think—

Mr. Wood: He says: "I took coal at Nagasaki about 1050 tons." (This is page 39 of his deposition). "Q. How much coal in the deck bunker? A. Maybe about 500 tons. Q. And how much 'tween deck bunkers? A. About 200. Q. And how much in the hold cross bunker. A. Altogether about 500. Well, I think the deck bunker was somewhat more than 500 tons. Q. How much did you have in at Nagasaki when you got through coaling and left there? A. About 1300. Q. You coaled once after you left Portland until you got to Bombay? A. No, I coaled at Singapore again."

Mr. Hayden: I think that is "called" again.

Mr. Wood: How could that be? The whole thing is talking about coal.

Court: Does it say how much coal she had when she arrived at Bombay?

Mr. Wood: No, it doesn't except in this certificate here, which I have objected to, it says they had 500 tons. Is that about what he would have at Bombay—500 tons—if he took 1300 at Nagasaki?

A. It should be less.

Mr. Wood: Then, it would look as if he did coal at Singapore.

A. No, those amount, she should consume more coal between Bombay and Portland—no, Bombay and Nagasaki; so she had no chance to take coal, she

(Testimony of C. Okuda.)

had no occasion to take coal at Singapore. No, no, I am mistaken. I cannot express it.

Mr. Wood: Let me ask you another question.

A. Yes.

Examination by Mr. Wood:

Q. He was fourteen days from Nagasaki to Singapore?

A. Yes.

Q. He was sixteen days from Singapore to Bombay?

A. Yes.

Q. Thirty days?

A. Yes.

Q. He left Nagasaki with 1300 tons?

A. Yes.

Q. Japanese coal?

A. Yes. I think that is best of all coal.

Q. How much would he have in thirty days, when he got to Bombay?

A. Thirty days 900—32 ton 900—it should be consumed.

Q. No, 900—he says he consumed 30 tons a day of Japanese coal. That would be 900?

A. I calculated 32 tons.

Q. That would leave 400?

A. 30 days 900 ton.

Q. Yes, that would leave 400?

A. Yes, sir.

Q. If he took none at Singapore?

(Testimony of C. Okuda.)

Court: I got the impression he coaled at Singapore as well as Nagasaki.

Mr. Hayden: The log says 2:20 on the 17th of July they finished with the engine going in at Singapore, finished with the engine at Singapore, 4 o'clock, light air and fine cloudy weather, 5:28 which is three hours and eight minutes while he was in Singapore, 3 hours and 8 minutes, stand by 5:30, weighed anchor and left Singapore for Bombay. He was only in there three hours and eight minutes.

A. Did that state he took in any coal?

Mr. Hayden: No, he doesn't say anything about it at all.

Mr. Wood: Singapore is a coaling port?

A. Yes.

Mr. Hayden: Captain, do you know the port at Singapore?

A. Yes.

Mr. Hayden: He said he weighed anchor; he didn't go to any wharf. Could he get coal out on the steamer?

A. No, I don't think so; but they might send the coal by the barge; but I don't think she can take any coal while staying only three hours—it is rather impossible.

Mr. Hayden: There isn't any mention of taking any, here in the log.

Mr. Wood: Is Colombo a coaling port, too?

A. Yes. But Singapore, you have to buy the Japanese coal, paying the freight. How did he

(Testimony of C. Okuda.)

draw, entering draft and leaving draft? Does he say?

Mr. Hayden: Let's see. He has got here the same draft—20 ft. 9, 23 ft. 2; 20 ft. 9 and 23 ft. 2.

A. Then she didn't take any coal.

Mr. Hayden: That would indicate that she didn't take any coal?

A. No.

Excused.

CHARLES E. DANT, called as a witness on behalf of the Claimant, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

Questions by Mr. Huffer:

Q. What is your full name?

A. Charles E. Dant.

Mr. Wood: I admit his qualifications as an expert on lumber prices.

Q. You are acquainted with the market value of Oregon Pine lumber on the second of August and the fourth of June, 1917?

A. Yes, sir.

Q. Referring to this list—you have a carbon copy of it—"Adnexa", which was read in evidence by Mr. Wheelwright when on the stand, what was the market value of those long lengths 800,000 feet 12x12, 24 to 34 feet, and one million 12x12 35 and

(Testimony of Charles E. Dant.)

up, average of 40 feet? What was the market value of that in Portland, Oregon, on August 2, 1917, wholesale for export trade?

A. I looked up the price on this whole specification as being an average price of \$22.25.

Q. That is the eight hundred thousand and the million?

A. Well, that would take in the whole specification.

Mr. Wood: The whole "Adnexa"?

A. The whole thing, yes, sir.

Mr. Wood: The whole "Adnexa" schedule?

A. Yes, take this whole schedule.

Q. And how much higher would those long lengths be than the entire list?

A. Well, you see, here it runs one million 35 and up; well, the one item there of one million feet would be worth maybe \$23; that is, picking out that one item.

Court: That is the long length?

A. That is the long length, yes; that is 35 and up. It is not so very long.

Mr. Hayden: What date was that?

Mr. Huffer: August 2, 1917.

Mr. Wood: Is that right?

A. Yes.

Mr. Wood: That is the date you refer to?

A. Yes, that is the date, from June to August.

Q. And on June 4, 1917, was the market value the same?

(Testimony of Charles E. Dant.)

A. Just about the same, as far as I can find from my records.

CROSS EXAMINATION.

Questions by Mr. Wood:

Q. Mr. Dant, do you understand that there was a lumber cargo here contracted for to go to Bombay, made up on a certain schedule, and that a part of it was left behind, according to our contention, and that part left behind consisted of the longer lengths of the cargo? You understand those are the facts?

Mr. Huffer: Objected to as irrelevant and immaterial. I am asking about specific lumber, of specific description; and if it fits the case it is relevant, and if it does not fit the case it is irrelevant.

Mr. Wood: I only want to see if he knows what kind of lengths these were that were left behind.

A. I don't know anything about what was left behind, no, sir.

Q. The lengths varied. I don't know myself how long they were or what they averaged, but they certainly differed a good deal in their lengths. Now, can you say what the market value here was of that lumber, not knowing specifically the dimensions of it?

Same objection.

A. Well, all I can say is that this schedule as a whole would be worth \$22.25 on those dates, and that this one item picked out alone—

Q. Which one do you mean?

(Testimony of Charles E. Dant.)

A. This one, I mean, 12x12, 35 and up, would be worth \$23.

Q. That is all you testified to, that one item and then the whole schedule?

A. Yes.

Mr. Huffer: The list "Adnexa", your Honor, is the list which was part of the contract with the Gillanders people.

Court: Mr. Wheelwright figured on a certain basis.

Mr. Wood: "G" list.

Q. (Mr. Huffer). And this is figured on the "G" list?

A. That is figured on the "G" list.

Mr. Wood: The only purpose of my question is that Mr. Wheelwright told me during the noon hour that nobody could testify as to the market value here of the lumber that was left behind without taking the schedule and then finding out which part of it was left behind in detail and then making his calculations on that knowledge; and I wanted to know if Mr. Dant thought he could state the market value not having that knowledge.

Mr. Huffer: That is a matter wholly within their knowledge; not ours; what they intended to ship, what was put aboard, and what was left behind. We are making the best proof we can under the circumstances. We are taking the "Adnexa" list, which is part of the Gillanders contract, and directing our evidence to that.

(Testimony of Charles E. Dant.)

Q. Have you figured this on the basis of "G" list?

A. Yes.

Q. There is a list known as "H" list also?

A. Yes.

Q. Prevalent at the same time, in use at the same time?

A. Well, in looking this up, I found that we did not commence to use the "H" list on our business to China until some time after this, some little time after this; but the "H" list was being used, I think, by some people at this time.

Mr. Huffer: I just want to identify this list. I offer it in evidence.

Marked "Claimant's Exhibit O".

Q. June 4, 1917, both the same years—June and August of the same year?

A. Yes.

Excused.

FRANCIS W. CULLUM, recalled for the Respondent.

DIRECT EXAMINATION.

Questions by Mr. Hayden:

Q. I want to ask you if you heard the testimony about the forward deck-load, if she were loaded down to an even keel, which would be nine feet about.

A. Yes.

(Testimony of Francis W. Cullum—Recalled.)

Q. Will you explain the difficulties of navigating in a storm under those conditions?

A. You mean to say she had nine feet deck-load forward and only four feet aft?

Q. Yes; talking about one of these storms, now, where you have lots of wind.

A. If you wanted to heave her to, you would have great difficulty—take a long time to bring her up to the wind. When you did bring her up to the wind, you would have great difficulty in keeping her there. You would have to have a lot of power to keep her there; slow the engines down, so she would go slowly into the sea; but with big deck-load forward, nothing aft, the wind would catch you—tendency is to throw her off—with more power, which gives her more headway, put more power into her, see? If very high deck-load, you have great difficulty in getting her up there at all.

Excused.

Mr. Hayden: I think that is all.

Mr. Wood: Yesterday your Honor asked if Mr. Orrett's telegram from San Francisco, instructing the captain to take 750,000 feet on the deck was communicated to the captain. You remember the telegram was to the Pacific Export Lumber Company. It said it was, and that I would produce a letter to the captain showing it, and I will show it to your Honor now and offer it in evidence.

(Testimony of Francis W. Cullum—Recalled.)

The letter is marked "Libelant's Exhibit W", and reads as follows:

"Portland, Oregon, June 1, 1917.

Captain Y. Yamamoto,
SS 'Saigon Maru,'
City.

Dear Sir:

Referring to our letter of yesterday, we ask you to take due note of a telegram received by us this morning from the agent of your company, Mr. Edwin Orrett, dated San Francisco, May 31st, reading as follows:

'Advise Captain will expect him to load up to the capacity as indicated by marine surveyor and approximately seven hundred and fifty thousand feet on deck.'

Understanding that Captain Yano has stated that your owners did not expect you to take any deck-load, we have to say that your owners wrote Mr. Orrett, their agent at Tacoma, under date of Mar. 14th advising that 'the ship is to be loaded at Portland with a full cargo of lumber for Bombay. Deck-loads to be handled as much as safety of steamer permits.'

Herein we hand you for perusal the original letter of Mr. Orrett containing the above statement, and we again notify you that your ship will not be cleared from this port until she has loaded an entire cargo of lumber and/or timber as provided in the

(Testimony of Francis W. Cullum—Recalled.)

Charter Party. Any delay, damage, demurrage or expense incurred by your failure to do so will be for account of the ship.

Yours faithfully,

Pacific Export Lumber Co.

By Wm. D. Wheelwright,
President."

Enclosure: Mr. Orrett's letter.

FRANCIS W. CULLUM, recalled for Respondent.

DIRECT EXAMINATION.

Questions by Mr. Hayden:

Q. Captain Cullum, what do you think of a ship being trimmed 3 foot 6 by the stern, loaded with a deck-load of lumber, going through those waters, as to whether or not that would be a good condition for the ship?

A. No, I wouldn't say that is good trim, sir.

Q. Why not?

A. Well, as a rule, a steamer, as a rule, to be in first-class trim, we generally allow about six inches by the stern, just for the pitch of the ship and the drive of her propeller, so as to get on even keel—when the ship is built—then so the pitch of her propeller will just about get her on even keel. When you have more than that, you have a drag all the time; you cannot get the maximum speed out of your ship.

Q. If you should have to scud from one of these

(Testimony of Francis W. Cullum—Recalled.)

storms, to run away from it, what would be the effect if it overtook you?

A. You mean if you are running heavy?

Q. Yes, with three foot six by the stern?

Court: Wouldn't that depend on what you had on the bow of your ship?

Mr. Hayden: I am only talking now about the draft, your Honor. She is down three foot six by the stern. I want this witness to explain whether or not she would rise as quickly.

A. No, she would not rise as quickly to the sea as she would with the ordinary six inches. I wouldn't call it an ideal draft by a long way.

Q. Would you call it a reasonably safe draft, to go through those waters at that time of the year, if she should happen to get into one of those typhoons?

Mr. Wood: Three foot six?

Mr. Hayden: Three foot six by the stern, with a deck-load on her.

A. Well, as I said before, it would not be a good draft, sir. I would not say it would be a dangerous draft; it is not a good draft. A proper sailorman, if he could possibly avoid it, would not do it.

Q. A sailorman would not do it, you say?

A. Not if he could have his ideal way of loading a ship, he would try to load his ship different to that. If he has the loading of the ship from top to bottom, he would not load his ship like that to go there if he could possibly avoid it. There are times

(Testimony of Francis W. Cullum—Recalled.)

you cannot avoid it, and you have got to go that way.

Q. You don't know whether that would be dangerous or not?

A. I wouldn't say it would be dangerous. I say it wouldn't be good trim. It is less dangerous the other way. I wouldn't say she would be lost, or anything like that. She would be liable to poop over, take more water aft than she would the other way.

Mr. Wood: Under what conditions would she be three foot six by the stern?

Mr. Hayden: Level decks forward and aft.

Mr. Wood: I don't see the materiality of that. It was not proposed to load her that way.

Mr. Hayden: I would like to know how you did propose to load her. I asked your surveyors how they proposed to load her; they proposed to put about 10 feet both fore and aft, by what Captain Genereaux said; and as I understood it, Captain McNaught said he proposed to load it so she would be about on even keel fore and aft. You have covered that situation. Now, I don't know how you did propose to load her, if that is not the way you intended to do it.

Mr. Wood: I think the record will have to speak for itself, but my recollection is, for your information, they said something about 11 feet forward and 9 feet aft, or 10 feet forward and 8 feet aft—something like that.

Mr. Hayden: Well, I didn't remember that. I

(Testimony of Francis W. Cullum—Recalled.)

tried to figure out what they had said. That is all, Captain.

Excused.

CLAIMANT RESTS.

Mr. Wood: Before the case closes, your Honor, there was one point that Mr. Wheelwright was anxious to have brought out. I think possibly these gentlemen will admit it. It has been referred to in some of the letters, but it has not been testified to. And that is, by the Pacific Export Lumber Co. giving this ship extra dispatch at this port, that is, loading here quickly, more quickly than they had to, they saved the vessel about thirteen thousand dollars, more than the amount of this total claim. Now, I cannot say that I think that necessarily has a legal bearing on it, and yet it might have some bearing, and Mr. Wheelwright was very anxious to have that in the record, and if these gentlemen will admit it, well and good; otherwise I will have to ask him to testify to it.

Court: Didn't he testify to it?

Mr. Wood: It is referred to in one of the letters. I don't think it has been testified to, your Honor.

Mr. Huffer: It is referred to in one of his letters. He is not suing on any claim for extra dispatch, or anything of that kind, and when the charter-party was made up all the terms were put in it. It is wholly immaterial, because it is on the same footing as anything else that is put in the charter-

party. The parties correspond, talk the matter over, and determine what they are going to be liable for, or what they are going to pay for, and what they are not going to pay for, and they are specified, and dispatch is sometimes specified.

Court: How much was the demurrage?

Mr. Wood: I think the demurrage was \$2,000 a day. By failing to take the cargo that we said she should take she loaded about two days quicker; in other words, saved herself about \$4,000 on that item alone.

Court: I suppose that will appear in the testimony that is in.

At the conclusion of the reading of the deposition of the witness, Y. Yamamoto, as shown on page 708 hereof, there was read in evidence the following stipulation, to-wit:

"It is stipulated that at the time of the execution of the charter party mentioned in the libel herein and at all times since, the claimant herein, Osaka Shosen Kaisha, was and still is a corporation organized and existing under and by virtue of the laws of Japan, with its principal place of business at Osaka in said country, and was during all of said times and is still the owner, in possession and engaged in the operation of said steamer, 'Saigon Maru' which was at all of said times and still is a Japanese vessel, and not a vessel of the United States or of the State of Oregon, nor constructed in said State."

v. Pacific Export Lumber Company 625

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a cor-
poration,

Plaintiff,

v.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.

Defendant.

OSAKA SHOSHEN KAISHA,

Claimant.

UNITED STATES OF AMERICA, }
District of Oregon. } ss.

I, Margaret A. Fleming, do hereby certify that I was the stenographer employed with the consent of the court, by counsel for the respective parties in the above entitled cause; that I attended in open court during the trial of said cause and personally took down in shorthand the testimony and proceedings taken and had in said trial; that the said testimony and proceedings were transcribed by me and under my supervision and direction, and that the foregoing is a true transcript and statement of all of the testimony of all of the witnesses who testified in the trial of said cause before said court and of all the oral testimony given in said trial and of all the proceedings had therein; that said testimony and proceedings were taken down in the presence of the respective parties and of the court, and said trans-

cript and statement is a true copy of the whole thereof.

I further certify that I am not of counsel or attorney of either of the parties nor interested in the event of the cause; that each of the witnesses testifying at said trial was duly sworn to testify the truth, the whole truth and nothing but the truth before his testimony was taken.

Dated this 25th day of October, 1920.

(Signed) MARGARET A. FLEMING.

UNITED STATES OF AMERICA, }
District of Oregon. } ss.

I, Charles E. Wolverton, United States District Judge for the District of Oregon, and the judge before whom the foregoing case of Pacific Export Lumber Co., a corporation, libellant, vs. The Japanese Steamer "Saigon Maru", her tackle, apparel, etc., respondent, being admiralty cause No. 7467 of the files of said court, was heard and tried, do hereby certify that William D. Wheelwright, Emile C. Genereaux, Andrew Hoben, W. C. McNaught, Henry Rothschild, Edwin Orrett, Francis W. Cullom,, C. Okuda, and Charles E. Dant, the witnesses a transcript of whose testimony is hereto attached, personally appeared in open court before me at the trial of said action on the dates mentioned in said transcript and then and there gave their evidence; that said evidence and all of the proceedings of said trial were taken down in shorthand by Margaret A. Fleming, a regular court stenographer in my presence

and in the presence of said witnesses, and said evidence and proceedings were duly transcribed by her; that the attached is a full, true and correct statement and transcript of all the evidence given orally in open court before me in said cause and also of all the proceedings at said trial; that the depositions of A. Clapham, W. Hunter, Y. Yamamoto, Toro Yamaguchi, Y. Yano and Kawamoto Fedesuki mentioned in said transcript as having been read in evidence at said trial, were so read, and were introduced and filed; that the exhibits mentioned in said transcript and depositions were introduced and admitted in evidence and filed in said cause.

And I further certify that the matters and proceedings embodied in the foregoing transcript are matters and proceedings occurring in said cause, and that the same are hereby made a part of the record herein; that said transcript, together with all the exhibits, original depositions, referred to therein and other written evidence on file in said cause contain all the facts, matters and proceedings occurring in the trial of said cause; that said transcript and the evidence therein contained or referred to, with all the exhibits attached thereto or to said depositions, are hereby made a part of the record in said cause.

And I further certify that libellant, claimant and the United States Fidelity & Guaranty Company, stipulator for costs and to abide the decree herein, have, by their respective proctors, agreed to the correctness of the foregoing statement and transcript

and to the certification of the same, according to the form and tenor of this certificate.

Dated this 26th day of October, 1920.

Sig. CHAS. E. WOLVERTON,
Judge of the District Court
of the United States for the
District of Oregon.

We agree to the foregoing:

WOOD, MONTAGUE & MATTHIESSEN,
Proctors for Libelant.

FRANK A. HUFFER

and

HUFFER & HAYDEN,

Proctors for Claimant and said United
States Fidelity & Guaranty Company.

DEPOSITIONS.

During the trial the following depositions were introduced and read in evidence, to wit:

Deposition of A. CLAPHAM, a witness for LIBELANT.

Deposition of W. HUNTER, a witness for LIBELANT.

Deposition of Y. YAMAMOTO, a witness for CLAIMANT.

Deposition of TORO YAMAGUCHI, a witness for CLAIMANT.

Deposition of F. KAWAMOTO, a witness for CLAIMANT.

Deposition of Y. YANO, a witness for CLAIMANT.

LIBELANT'S EXHIBIT "S"

DEPOSITION OF A. CLAPHAM, a Witness for Libelant.

In the District Court of the United States for the District of Oregon.

No. 7467.

STIPULATION TO TAKE DEPOSITION OF
A. CLAPHAM.

PACIFIC EXPORT LUMBER COMPANY, a corporation,

vs.

Libelant,

THE JAPANESE STEAMER "SAIGON MARU,"
her tackle, apparel, etc.

Respondent,

OSAKA SHOSEN KAISHA, a corporation organized and existing under the laws of Japan,

Claimant.

(Deposition of A. Clapham.)

It is stipulated by and between Pacific Export Lumber Company, the above named libelant, and Osaka Shosen Kaisha, the above named claimant, through their respective proctors, that the deposition of A. Clapham, a witness for libelant, may be taken at Bombay, India, or at any other place, upon the interrogatories and cross interrogatories hereto annexed, by virtue of this stipulation and without commission or other authority or power, and without notice, before any consul-general, consul, vice-consul, or deputy consul appointed by the Government of the United States, at such time as such consular officer may fix; and that the taking of said deposition may be adjourned from time to time to suit the convenience of such officer and said witness. The certificate and seal of such officer shall be sufficient proof of his name, signature and official character without other or further authentication or proof; and any and all preliminaries to the taking of such deposition required by law or rule of court are hereby dispensed with and any and all objections to the authority, power or capacity of such officer to take said deposition are hereby waived.

Said deposition, when taken, shall be mailed by such consular officer to the Clerk of the above entitled court at Portland, Oregon, and may be read in evidence by either party subject only to the objections (to be taken at the time the same are read in evidence) as to the competency, ma-

(Deposition of A. Clapham.)

teriality or relevancy of the testimony therein set forth, and all other objections are hereby waived.

Dated this 20th day of Mareh, 1918.

ERSKINE WOOD,
Of Proctors for Said Libellant.

F. A. HUFFER,
Of Proctors for Said Claimant.

INTERROGATORIES TO BE PROPOUNDED TO
A. CLAPHAM,

The Witness Named in the Preceding Stipulation:

FIRST INTERROGATORY.

Please state your name, age, residence and occupation.

SECOND INTERROGATORY.

What is your relationship, or connection, with the firm of Gillanders, Arbuthnot & Company?

THIRD INTERROGATORY.

What experience have you had to qualify you to testify to the market price of Oregon pine lumber in Bombay during the latter half of the year 1917?

FOURTH INTERROGATORY.

Are you familiar with the market price of Oregon pine lumber at Bombay during that time?

FIFTH INTERROGATORY.

Did Gillanders, Arbuthnot & Company purchase a quantity of Oregon pine lumber from Pacific Ex-

(Deposition of A. Chpham.)

port Lumber Company of Portland, Oregon, for delivery in Bombay, by the Japanese steamer "Saigon Maru" during the latter part of 1917?

SIXTH INTERROGATORY.

Are you familiar with the terms of that contract of purchase?

SEVENTH INTERROGATORY.

If you state that you are familiar with that contract of purchase, please state what was the amount of lumber purchased, the price and terms.

EIGHTH INTERROGATORY.

How much of this lumber contracted for was actually delivered to Gillanders, Arbuthnot & Company by Pacific Export Lumber Company and by what ship?

NINTH INTERROGATORY.

If there was any shortage in the delivery of this lumber under contract of purchase from Pacific Export Lumber Company, please state what that shortage amounted to.

TENTH INTERROGATORY.

What was the date of arrival at Bombay of the Japanese Steamer "Saigon Maru" on the voyage on which she carried this lumber purchased from the Pacific Export Lumber Company?

ELEVENTH INTERROGATORY.

At the time the "Saigon Maru" arrived in Bombay on this voyage, what was the market price in

(Deposition of A. Clapham.)

Bombay of Oregon pine lumber of the same general character as that purchased by Gillanders, Arbuthnot & Company from the Pacific Export Lumber Company?

TWELFTH INTERROGATORY.

If Gillanders, Arbuthnot & Company suffered any loss by not receiving the full amount of the Oregon pine lumber purchased by them from the Pacific Export Lumber Company, please state what that loss amounted to in money.

THIRTEENTH INTERROGATORY.

If you say there was a loss, please explain how you calculate it.

FOURTEENTH INTERROGATORY.

At this time, during the latter part of the year 1917, what were the most valuable sizes of lumber in the Bombay market?

FIFTEENTH INTERROGATORY.

Did this cargo carried by the "Saigon Maru" contain the proportion of these more valuable sizes for which Gillanders, Arbuthnot & Company had contracted?

SIXTEENTH INTERROGATORY.

If there was a shortage in the delivery of these more valuable sizes, please state the amount of that shortage as nearly as you can.

SEVENTEENTH INTERROGATORY.

If, by reason of the failure to receive the amount

(Deposition of A. Clapham.)

of these more valuable sizes contracted for, Gillanders, Arbuthnot & Company suffered any loss in addition to such loss as you may have stated in answer to the Twelfth Interrogatory, please state what that additional loss amounted to.

EIGHTEENTH INTERROGATORY.

Does Gillanders, Arbuthnot & Company hold the Pacific Export Lumber Company liable in damages for failure to deliver the full amount of Oregon pine lumber contracted for, and if so, what is the total amount of damages which it claims against the Pacific Export Lumber Company?

WOOD, MONTAGUE, HUNT & COOKINGHAM
and
ERSKINE WOOD,
Proctors for Libelant.

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

CROSS INTERROGATORIES.

PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libelant,

vs.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.

Respondent.

(Deposition of A. Clapham.)

OSAKA SHOSEN KAISHA, a corporation organized and existing under the laws of Japan,
Claimant.

Now comes the above named claimant, Osaka Shosen Kaisha, and, reserving and not waiving its objections as to the competency, materiality or relevancy of the interrogatories propounded by libellant's proctors to the witness A. Clapham, named in the attached stipulation and libellant's interrogatories, or of the answers of said witness to said interrogatories or any of them, propounds to said witness the following cross-interrogatories:

FIRST CROSS-INTERROGATORY.

What persons, firms or corporations, if any, were, during the latter half of 1917, engaged at Bombay in the business of buying Oregon pine lumber?

SECOND CROSS-INTERROGATORY.

What persons, firms or corporations were, during said time, engaged at Bombay in the business of selling Oregon pine lumber?

THIRD CROSS-INTERROGATORY.

During said time were there any lumber yards at Bombay or vicinity having on hand stocks of Oregon pine lumber for sale? If so, state the names thereof and who were the owners of the same.

FOURTH CROSS-INTERROGATORY.

Is it not a fact that during said period the only user of Oregon pine lumber was the Government of India?

(Deposition of A. Clapham.)

FIFTH CROSS-INTERROGATORY.

Is it not a fact that all Oregon pine lumber imported into Bombay during said period was for the Government of India?

SIXTH CROSS-INTERROGATORY.

If in answer to libelant's fifth interrogatory you have answered that Gillanders, Arbuthnot & Company did purchase a quantity of Oregon pine lumber from the Pacific Export Lumber Company of Portland, Oregon, for delivery in Bombay by the Japanese steamer "Saigon Maru", in the latter part of 1917, please state whether you in turn sold said lumber, and if so, to whom, giving in full the name and address of the purchaser.

SEVENTH CROSS-INTERROGATORY.

If you have answered that you did purchase such lumber as stated in the foregoing interrogatory, and afterwards sold the same, please state whether you sold it to Chatanee Native Timber Merchants, and, if so, did said merchants sell the same to the Government of India?

EIGHTH CROSS-INTERROGATORY.

If you have answered that you did purchase such lumber as stated in the foregoing interrogatory, and afterwards sold the same, please state whether you sold it to the Government of India through the agency of Chatanee Native Timber Merchants and if so, what commission was paid to them by Gillanders, Arbuthnot & Company for making said sale.

(Deposition of A. Clapham.)

NINTH CROSS-INTERROGATORY.

If you have answered that you purchased the lumber from the Pacific Export Lumber Company at the time and in the manner mentioned in libelant's fifth interrogatory, and that you sold the same, please state if you know to whom and for what purpose it was ultimately delivered.

TENTH CROSS-INTERROGATORY.

If you have answered libelant's fifth and sixth interrogatories in the affirmative, please state whether the contract therein referred to was oral or in writing.

ELEVENTH CROSS-INTERROGATORY.

If in answer to libelant's eleventh interrogatory you have stated the market price of Oregon pine lumber of the kind therein mentioned, at the time and place therein stated, please state whether the market price given by you is based upon the sales made at wholesale or at retail.

TWELFTH CROSS-INTERROGATORY.

If in answer to libelant's eleventh interrogatory you have stated the market price of Oregon pine lumber of the kind therein mentioned, at the time and place therein stated, please state whether the market price given by you is based upon sales made by the Bombay importer or importers of the lumber or those made by subsequent purchasers from such importer or importers.

(Deposition of A. Clapham.)

THIRTEENTH CROSS-INTERROGATORY.

If in answer to libellant's eleventh interrogatory you have stated the market price of Oregon pine lumber of the kind therein mentioned, at the time and place therein stated, please give instances of sales at Bombay of Oregon pine lumber upon which you base your opinion as to its market price, giving the dates of the purchases, the conditions thereof, the names of the sellers and purchasers, the quantity sold, and the price paid, and the general description of the dimensions and finish or lack of finish of the lumber so sold, and for what and whose use the same were sold.

FOURTEENTH CROSS-INTERROGATORY.

If in answer to libellant's eleventh interrogatory you have stated the market price of Oregon pine lumber of the kind therein mentioned, at the time and place therein stated, is the market price given by you based upon sales made to wholesalers and jobbers, or to the ultimate consumers.

FIFTEENTH CROSS-INTERROGATORY.

Is it not a fact that during the latter half of 1917 Gillanders, Arbuthnot & Company were the only merchants who imported lumber or timber from America into Bombay?

SIXTEENTH CROSS-INTERROGATORY.

Is it not a fact that during the latter half of 1917 Gillanders, Arbuthnot & Company were the

(Deposition of A. Clapham.)

only importers of lumber from America engaged in the sale of the same at Bombay?

SEVENTEENTH CROSS-INTERROGATORY.

Is it not a fact that during the latter half of the year 1917 Gillanders, Arbuthnot & Company were the only merchants who were engaged in the business of importing lumber into Bombay from America for purposes of sale?

EIGHTEENTH CROSS-INTERROGATORY.

Is it not a fact that during the latter half of the year 1917 Gillanders, Arbuthnot & Company were the only merchants engaged in the business of importing into Bombay for sale Oregon pine or Douglas fir lumber or timber?

NINETEENTH CROSS-INTERROGATORY.

Is it not a fact that the only Oregon pine lumber or timber sold in Bombay during the latter half of the year 1917 was lumber or timber that had been imported and sold by Gillanders, Arbuthnot & Company.

TWENTIETH CROSS-INTERROGATORY.

Is it not a fact that during the first half of the month of August, 1917, Gillanders, Arbuthnot & Company were the only merchants who imported lumber or timber from America?

TWENTY-FIRST CROSS-INTERROGATORY.

Is it not a fact that during the first half of the month of August, 1917, Gillanders, Arbuthnot & Company were the only importers of lumber from

(Deposition of A. Clapham.)

America engaged in the sale of the same at Bombay?

TWENTY-SECOND CROSS-INTERROGATORY.

Is it not a fact that during the first half of the month of August, 1917, Gillanders, Arbuthnot & Company were the only merchants who were engaged in the business of importing lumber into Bombay from America for purposes of sale?

TWENTY-THIRD CROSS-INTERROGATORY.

Is it not a fact that during the first half of the month of August, 1917, Gillanders, Arbuthnot & Company were the only merchants engaged in the business of importing into Bombay for sale Oregon pine or Douglas fir lumber or timber?

TWENTY-FOURTH CROSS-INTERROGATORY.

Is it not a fact that the only Oregon pine lumber or timber sold in Bombay during the first half of the month of August, 1917, was lumber or timber that had been imported and sold by Gillanders, Arbuthnot & Company.

TWENTY-FIFTH CROSS-INTERROGATORY.

Please describe specifically and give the amount of lumber and timber which you say Gillanders, Arbuthnot & Company purchased from the Pacific Export Lumber Company and which was actually delivered to Gillanders, Arbuthnot & Company ex S. S. "Saigon Maru."

TWENTY-SIXTH CROSS-INTERROGATORY.

Please state what amount of import customs

(Deposition of A. Clapham.)

duties were paid upon the lumber and timber bought by and delivered to Gillanders, Arbuthnot & Company at Bombay ex S. S. "Saigon Maru," upon the entry of the same at the customs house in Bombay.

TWENTY-SEVENTH CROSS-INTERROGATORY

What is the amount of insurance premiums, if any, paid by Gillanders, Arbuthnot & Company for insurance upon the lumber and timber purchased and delivered aforesaid at Bombay ex S. S. "Saigon Maru" in the early part of August, 1917?

TWENTY-EIGHTH CROSS-INTERROGATORY.

If in your testimony you have stated the market value of Oregon pine lumber or timber at Bombay, India, in the latter half of the year 1917, please state whether the market value given by you is the market value f. o. b. vessel in the port of Bombay or its market value in the City of Bombay after it passed the customs and the import duties had been paid thereon.

TWENTY-NINTH CROSS-INTERROGATORY.

If you have answered that you purchased a quantity of Oregon pine lumber from the Pacific Export Lumber Company which was delivered to you at Bombay, India, ex S. S. "Saigon Maru," please state whether this lumber was delivered directly from the ship to your dock, and if not, upon what dock.

(Deposition of A. Clapham.)

THIRTIETH CROSS-INTERROGATORY.

If in answer to the foregoing interrogatory you say that the lumber in question was not delivered to you directly on your dock from the steamer, please state whether the market value of Oregon pine lumber which has been given by you as the market value on the dock from which it was unloaded from the steamer was the market value in your own yards at Bombay.

F. A. HUFFER,

W. H. HAYDEN

and

HUFFER & HAYDEN,

Proctors for Claimant.

INTERROGATORIES PROPOUNDED TO A. CLAPHAM, THE WITNESS NAMED IN THE PRECEDING STIPULATION, AND HIS ANSWERS THERETO.

FIRST INTERROGATORY.

Q. Please state your name, age, residence and occupation.

A. Arthur Lewis Clapham. Thirty-nine years of age. Bombay, India. Manager of Bombay Branch of Gillanders, Arbuthnot Co.

SECOND INTERROGATORY.

Q. What is your relationship, or connection, with the firm of Gillanders, Arbuthnot & Company?

A. Manager of their Bombay Branch.

(Deposition of A. Clapham.)

THIRD INTERROGATORY.

Q. What experience have you had to qualify you to testify to the market price of Oregon pine lumber in Bombay during the latter half of the year 1917?

A. I have been Manager of Messrs. Gillanders, Arbuthnot & Co.'s Bombay Branch since January, 1912. The principal business of the Branch is timber.

FOURTH INTERROGATORY.

Q. Are you familiar with the market price of Oregon pine lumber at Bombay during that time?

A. Yes.

FIFTH INTERROGATORY.

Q. Did Gillanders, Arbuthnot & Company purchase a quantity of Oregon pine lumber from Pacific Export Lumber Company of Portland, Oregon, for delivery in Bombay, by the Japanese steamer "Saigon Maru" during the latter part of 1917?

A. Yes.

SIXTH INTERROGATORY.

Q. Are you familiar with the terms of that contract of purchase?

A. Yes.

SEVENTH INTERROGATORY.

Q. If you state that you are familiar with that contract of purchase, please state what was the amount of lumber purchased, the price and terms.

(Deposition of A. Clapham.)

A. 5500 tons (10% more or less) @ £9.0.0 per ton of 50 cubic feet C. I. F. Bombay including war risk.

EIGHTH INTERROGATORY.

Q. How much of this lumber contracted for was actually delivered to Gillanders, Arbuthnot & Company by Pacific Export Lumber Company and by what ship?

A. 4550 tons were delivered in Bombay by the Japanese steamer S. S. "Saigon Maru."

NINTH INTERROGATORY.

Q. If there was any shortage in the delivery of this lumber under contract of purchase from Pacific Export Lumber Company, please state what that shortage amounted to.

A. After allowing 10% variation under the contract the shortage in the delivery amounted to 400 tons.

TENTH INTERROGATORY.

Q. What was the date of arrival at Bombay of the Japanese steamer "Saigon Maru" on the voyage on which she carried this lumber purchased from the Pacific Export Lumber Company?

A. 2d August, 1917.

ELEVENTH INTERROGATORY.

Q. At the time the "Saigon Maru" arrived in Bombay on this voyage, what was the market price in Bombay of Oregon pine lumber of the same general character as that purchased by Gillanders, Ar-

(Deposition of A. Clapham.)

buthnot & Company from the Pacific Export Lumber Company?

A. I know of no transaction in the Bombay Market in Oregon Pine on 2d August 1917, but the rate prevailing would be approximately that ruling on the 31st July, 1917, when Gillanders, Arbuthnot & Co. sold this timber to arrive @ Rs. 165/— per ton of 50 cubic feet C. I. F. Bombay.

TWELFTH INTERROGATORY.

Q. If Gillanders, Arbuthnot & Company suffered any loss by not receiving the full amount of the Oregon Pine Lumber purchased by them from the Pacific Export Lumber Company, please state what that loss amounted to in money.

A. £1075/—.

THIRTEENTH INTERROGATORY.

Q. If you say there was a loss, please explain how you calculate it.

A. The loss is represented by the difference in market price and the contract rate viz: 2.13.9 per ton of 50 cubic feet on 400 tons.

FOURTEENTH INTERROGATORY.

Q. At this time, during the latter part of the year 1917, what were the most valuable sizes of lumber in the Bombay market?

A. 12-inch squares.

FIFTEENTH INTERROGATORY.

Q. Did this cargo carried by the "Saigon Maru" contain the proportion of these more valuable sizes

(Deposition of A. Clapham.)

for which Gillanders, Arbuthnot & Company had contracted?

A. No.

SIXTEENTH INTERROGATORY.

Q. If there was a shortage in the delivery of these more valuable sizes, please state the amount of that shortage as nearly as you can.

A. 755 tons.

SEVENTEENTH INTERROGATORY.

Q. If, by reason of the failure to receive the amount of these more valuable sizes contracted for, Gillanders, Arbuthnot & Company suffered any loss in addition to such loss as you may have stated in answer to the Twelfth Interrogatory, please state what that additional loss amounted to.

A. Gillanders, Arbuthnot & Co. suffered an additional loss of Rs. 1/— to Rs. 2/— per ton of 50 cubic feet on the total quantity of 4550 tons delivered.

EIGHTEENTH INTERROGATORY.

Q. Does Gillanders, Arbuthnot & Company hold the Pacific Export Lumber Company liable in damages for failure to deliver the full amount of Oregon pine lumber contracted for, and if so, what is the total amount of damages which it claims against the Pacific Export Lumber Company?

A. Yes. £1075/— plus Rs. 1/— to Rs. 2/— per ton of 50 cubic feet on the total quantity delivered.

A. L. CLAPHAM.

(Deposition of A. Clapham.)

FIRST CROSS-INTERROGATORY.

Q. What persons, firms, or corporations, if any, were, during the latter half of 1917, engaged at Bombay in the business of buying Oregon pine lumber?

A. Gillanders, Arbuthnot & Co. M. M. H. J. M. Chotani.

SECOND CROSS-INTERROGATORY.

Q. What persons, firms or corporations were, during said time, engaged at Bombay in the business of selling Oregon pine lumber?

A. Gillanders, Arbuthnot & Co. M. M. H. J. M. Chotani.

THIRD CROSS-INTERROGATORY.

Q. During said time were there any lumber yards at Bombay or vicinity having on hand stocks of Oregon pine lumber for sale? If so, state the names thereof and who were the owners of the same.

A. Yes. Gillanders, Arbuthnot & Co. M. M. H. J. M. Chotani.

FOURTH CROSS-INTERROGATORY.

Q. Is it not a fact that during said period the only user of Oregon pine lumber was the Government of India?

A. No. There were other users in Bombay who bought Oregon pine from Chotani.

FIFTH CROSS-INTERROGATORY.

Q. Is it not a fact that all Oregon pine lumber imported into Bombay during said period was for the Government of India?

A. No.

(Deposition of A. Clapham.)

SIXTH CROSS-INTERROGATORY.

Q. If in answer to libelant's fifth interrogatory you have answered that Gillanders, Arbuthnot & Company did purchase a quantity of Oregon pine lumber from the Pacific Export Lumber Company of Portland, Oregon, for delivery in Bombay by the Japanese steamer "Saigon Maru", in the latter part of 1917, please state whether you in turn sold said lumber, and if so, to whom, giving in full the name and address of the purchaser.

A. Yes. Mia Mahomed Haji Jan Mahomed Chotani, Native Timber Merchant, Lewri, Bombay.

SEVENTH CROSS-INTERROGATORY.

Q. If you have answered that you did purchase such lumber as stated in the foregoing interrogatory, and afterwards sold the same, please state whether you sold it to Chatanee Native Timber Merchants, and if so, did said merchants sell the same to the Government of India?

A. I have already stated in answer to sixth Cross-Interrogatory that Gillanders, Arbuthnot & Co. sold the lumber to Chotani, Native Timber Merchant, Lewri, Bombay. He in turn sold it to various buyers including the Government of India.

EIGHTH CROSS-INTERROGATORY.

Q. If you have answered that you did purchase such lumber as stated in the foregoing interrogatory, and afterwards sold the same, please state whether you sold it to the Government of India

(Deposition of A. Clapham.)

through the agency of Chatanee Native Timber Merchants and if so, what commission was paid to them by Gillanders, Arbuthnot & Company for making said sale.

A. The timber was sold by Gillanders, Arbuthnot Co. to Chotani and Gillanders, Arbuthnot Co. had no interest whatsoever in any subsequent sales made by Chotani.

NINTH CROSS-INTERROGATORY.

Q. If you have answered that you purchased the lumber from the Pacific Export Lumber Company at the time and in the manner mentioned in libelant's fifth interrogatory, and that you sold the same, please state if you know to whom and for what purpose it was ultimately delivered.

A. The timber was sold by Chotani to various buyers, but for what purpose it was ultimately delivered is not known.

TENTH CROSS-INTERROGATORY.

Q. If you have answered libelant's fifth and sixth interrogatories in the affirmative, please state whether the contract therein referred to was oral or in writing.

A. The contract was contained in letters and telegrams.

ELEVENTH CROSS-INTERROGATORY.

Q. If in answer to libelant's eleventh interrogatory you have stated the market price of Oregon pine lumber of the kind therein mentioned, at the

(Deposition of A. Clapham.)

time and place therein stated, please state whether the market price given by you is based upon the sales made at wholesale or at retail.

A. The market price given by me in reply to libelant's eleventh interrogatory is based on Gillanders, Arbuthnot & Co.'s sale to Chotani.

TWELFTH CROSS-INTERROGATORY.

Q. If in answer to libelant's eleventh interrogatory you have stated the market price of Oregon pine lumber of the kind therein mentioned, at the time and place therein stated, please state whether the market price given by you is based upon sales made by the Bombay importer or importers of the lumber or those made by subsequent purchasers from such importer or importers.

A. My answer to Eleventh Cross Interrogatory covers this cross interrogatory.

THIRTEENTH CROSS-INTERROGATORY.

Q. If in answer to libelant's eleventh interrogatory you have stated the market price of Oregon pine lumber of the kind therein mentioned, at the time and place therein stated, please give instances of sales at Bombay of Oregon pine lumber upon which you base your opinion as to its market price, giving the dates of the purchases, the conditions thereof, the names of the sellers and purchasers, the quantity sold, and the price paid, and the general description of the dimensions and finish or lack

(Deposition of A. Clapham.)

of finish of the lumber so sold, and for what and whose use the same were sold.

A. Ditto.

FOURTEENTH CROSS-INTERROGATORY.

Q. If in answer to libelant's eleventh interrogatory you have stated the market price of Oregon pine lumber of the kind therein mentioned, at the time and place therein stated, is the market price given by you based upon sales made to wholesalers and jobbers, or to the ultimate consumers?

A. Ditto.

FIFTEENTH CROSS-INTERROGATORY.

Q. Is it not a fact that during the latter half of 1917 Gillanders, Arbuthnot & Company were the only merchants who imported lumber or timber from America into Bombay?

A. No. Chotani also imported a cargo of Oregon pine lumber for S. S. "Neils Neilson."

SIXTEENTH CROSS-INTERROGATORY.

Q. Is it not a fact that during the latter half of 1917 Gillanders, Arbuthnot & Company were the only importers of lumber from America engaged in the sale of the same at Bombay?

A. No.

SEVENTEENTH CROSS-INTERROGATORY.

Q. Is it not a fact that during the latter half of the year 1917 Gillanders, Arbuthnot & Company were the only merchants who were engaged in the

(Deposition of A. Clapham.)

business of importing lumber into Bombay from America for purposes of sale?

A. No.

EIGHTEENTH CROSS-INTERROGATORY.

Q. Is it not a fact that during the latter half of the year 1917 Gillanders, Arbuthnot & Company were the only merchants engaged in the business of importing into Bombay for sale Oregon pine or Douglas fir lumber or timber?

A. No.

NINETEENTH CROSS-INTERROGATORY.

Q. Is it not a fact that the only Oregon pine lumber or timber sold in Bombay during the latter half of the year 1917 was lumber or timber that had been imported and sold by Gillanders, Arbuthnot & Company?

A. No.

TWENTIETH CROSS-INTERROGATORY.

Q. Is it not a fact that during the first half of the month of August, 1917, Gillanders, Arbuthnot & Company were the only merchants who imported lumber or timber from America?

A. No. Others were importing American timber about that time, but whether it came direct from America I cannot say.

TWENTY-FIRST CROSS-INTERROGATORY.

Q. Is it not a fact that during the first half of the month of August, 1917, Gillanders, Arbuthnot & Company were the only importers of lumber from America engaged in the sale of same at Bombay?

(Deposition of A. Clapham.)

A. I have no knowledge beyond what I have stated in my reply to the previous Cross Interrogatory.

TWENTY-SECOND CROSS-INTERROGATORY.

Q. Is it not a fact that during the first half of the month of August, 1917, Gillanders, Arbuthnot & Company were the only merchants who were engaged in the business of importing lumber into Bombay from America for purposes of sale?

A. My answer to twentieth Cross Interrogatory covers this cross interrogatory.

TWENTY-THIRD CROSS-INTERROGATORY.

Q. Is it not a fact that during the first half of the month of August, 1917, Gillanders, Arbuthnot & Company were the only merchants engaged in the business of importing into Bombay for sale Oregon pine or Douglas fir lumber or timber?

A. Ditto.

TWENTY-FOURTH CROSS-INTERROGATORY.

Q. Is it not a fact that the only Oregon pine lumber or timber sold in Bombay during the first half of the month of August, 1917, was lumber or timber that had been imported and sold by Gillanders, Arbuthnot & Company?

A. I do not think so.

TWENTY-FIFTH CROSS-INTERROGATORY.

Q. Please describe specifically and give the amount of lumber and timber which you say Gillanders, Arbuthnot & Company purchased from the Pa-

(Deposition of A. Clapham.)

cific Export Lumber Company and which was actually delivered to Gillanders, Arbuthnot & Company ex S. S. "Saigon Maru".

A. Gillanders, Arbuthnot Co. purchased 5500 tons (10% more or less) Oregon pine lumber from the Pacific Export Lumber Co. and the quantity delivered in Bombay was 4550 tons. Particulars of the specifications of timber purchased and delivered can, if required, be obtained from Pacific Export Lumber Co.

TWENTY-SIXTH CROSS-INTERROGATORY.

Q. Please state what amount of import customs duties were paid upon the lumber and timber bought by and delivered to Gillanders, Arbuthnot & Company at Bombay ex S. S. "Saigon Maru" upon the entry of the same at the customs house in Bombay.

A. Gillanders, Arbuthnot & Co. sold the timber on C. I. F. terms and the customs duty was paid by the buyer.

TWENTY-SEVENTH CROSS-INTERROGATORY.

Q. What is the amount of insurance premiums, if any, paid by Gillanders, Arbuthnot & Company for insurance upon the lumber and timber purchased and delivered aforesaid at Bombay ex S. S. "Saigon Maru" in the early part of August, 1917?

A. The timber was purchased by Gillanders, Arbuthnot & Co. C. I. F. Bombay.

TWENTY-EIGHTH CROSS-INTERROGATORY.

Q. If in your testimony you have stated the mar-

(Deposition of A. Clapham.)

ket value of Oregon pine lumber or timber at Bombay, India, in the latter half of the year 1917, please state whether the market value given by you is the market value f. o. b. vessel in the port of Bombay or its market value in the City of Bombay after it passed the customs and the import duties had been paid thereon.

A. The timber was sold by Gillanders, Arbuthnot & Co. @ Rs. 165/— per ton of 50 cubic feet C. I. F. Bombay.

TWENTY-NINTH CROSS-INTERROGATORY.

Q. If you have answered that you purchased a quantity of Oregon pine lumber from the Pacific Export Lumber Company which was delivered to you at Bombay, India, ex S. S. "Saigon Maru", please state whether this lumber was delivered directly from the ship to your dock, and if not, upon what dock.

A. The timber was delivered overside S. S. "Saigon Maru" to the buyer.

THIRTIETH CROSS-INTERROGATORY.

Q. If in answer to the foregoing interrogatory you say that the lumber in question was not delivered to you directly on your dock from the steamer, please state whether the market value of Oregon pine lumber which has been given by you as the market value on the dock from which it was unloaded from the steamer was the market value in your own yards at Bombay.

(Deposition of A. Clapham.)

A. The market value given by me is the C. I. F. value delivered overside steamer Bombay Harbor.

A. L. CLAPHAM.

AMERICAN CONSULATE,
Bombay, British India. } ss.

This is to certify that I, Stuart Lupton, Consul of the United States of America at Bombay, India, by virtue of the foregoing stipulation to me directed, caused the above named A. Clapham, the deponent therein mentioned, to come before me in the said city of Bombay on the eighth day of August, A. D. 1918, and that the foregoing deposition subscribed by said deponent was taken before me at Bombay on the date last named, between the hours of ten A. M. and six P. M. of said day and the same was by the said A. Clapham reduced to writing. That before proceeding to the examination the said deponent was by me duly sworn to tell the truth, the whole truth, and nothing but the truth, in answer to the several interrogatories and cross interrogatories annexed, and thereupon he made and gave the foregoing answers; that the said deposition when completed was by me read to said deponent, and the same was thereupon by him in my presence subscribed.

In testimony whereof, I have hereunto set my hand and the seal of the Consulate of the United States of America, at Bombay, India, this ninth day of August, 1918.

STUART LUPTON,

Consul of the United States of America.

(Seal of the American Consulate, Bombay, India)
Consular No. 598.

Fee Rs. 39/1— \$12.50.

(Cancelled Stamps)

Filed October 21, 1918. G. H. Marsh, Clerk.

~~PLAN'S EXHIBIT "T"~~
**DEPOSITION OF W. HUNTER, A WITNESS
FOR LIBELANT.**

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

**STIPULATION TO TAKE DEPOSITION OF W.
HUNTER.**

**PACIFIC EXPORT LUMBER COMPANY, a cor-
poration,**

Libellant,

vs.

**THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.**

Respondent,

**OSAKA SHOSEN KAISHA, a corporation organ-
ized and existing under the laws of Japan,**

Claimant.

It is stipulated by and between Pacific Export Lumber Company, the above named Libellant, and Osaka Shosen Kaisha, the above named Claimant, through their respective proctors, that the deposition of W. Hunter, a witness for Libellant, may be taken at Calcutta, India, or any other place, upon

(Deposition of W. Hunter.)

the interrogatories and cross interrogatories hereto annexed, by virtue of this stipulation and without commission or other authority or power, and without notice, before any consul-general, consul, vice-consul, or deputy consul appointed by the Government of the United States, at such time as such consular officer may fix; and the taking of said deposition may be adjourned from time to time to suit the convenience of such officer and said witness. The certificate and seal of such officer shall be sufficient proof of his name, signature and official character without other or further authentication or proof; and any and all preliminaries to the taking of such deposition required by law or rule of court are hereby dispensed with and any and all objections to the authority, power or capacity of such officer to take said deposition are hereby waived.

Said deposition, when taken, shall be mailed by such consular officer to the Clerk of the above entitled court at Portland, Oregon, and may be read in evidence by either party subject only to the objections (to be taken at the time the same are read in evidence) as to the competency, materiality or relevancy of the testimony therein set forth, and all other objections are hereby waived.

Dated this 20th day of March, 1918.

ERSKINE WOOD,

Of Proctors for Said Libellant.

F. A. HUFFER,

Of Proctors for Said Claimant.

(Deposition of W. Hunter.)

INTERROGATORIES TO BE PROPOUNDED TO

W. HUNTER,

the witness named in the preceding Stipulation:

FIRST INTERROGATORY.

Please state your name, age, residence and occupation.

SECOND INTERROGATORY.

What is your relationship, or connection, with the firm of Gillanders, Arbuthnot & Company?

THIRD INTERROGATORY.

What experience have you had to qualify you to testify to the market price of Oregon pine lumber in Bombay during the latter half of the year 1917?

FOURTH INTERROGATORY.

Are you familiar with the market price of Oregon pine lumber at Bombay during that time?

FIFTH INTERROGATORY.

Did Gillanders, Arbuthnot & Company purchase a quantity of Oregon pine lumber from Pacific Export Lumber Company of Portland, Oregon, for delivery in Bombay, by the Japanese Steamer "Saigon Maru" during the latter part of 1917?

SIXTH INTERROGATORY.

Are you familiar with the terms of that contract of purchase?

SEVENTH INTERROGATORY.

If you state that you are familiar with that contract of purchase, please state what was the amount of lumber purchased, the price and terms.

(Deposition of W. Hunter.)

EIGHTH INTERROGATORY.

How much of this lumber contracted for was actually delivered to Gillanders, Arbuthnot & Company by Pacific Export Lumber Company and by what ship?

NINTH INTERROGATORY.

If there was any shortage in the delivery of this lumber under contract of purchase from Pacific Export Lumber Company, please state what that shortage amounted to.

TENTH INTERROGATORY.

What was the date of arrival at Bombay of the Japanese Steamer "Saigon Maru" on the voyage on which she carried this lumber purchased from the Pacific Export Lumber Company?

ELEVENTH INTERROGATORY.

At the time the "Saigon Maru" arrived in Bombay on this voyage, what was the market price in Bombay of Oregon pine lumber of the same general character as that purchased by Gillanders, Arbuthnot & Company from the Pacific Export Lumber Company?

TWELFTH INTERROGATORY.

If Gillanders, Arbuthnot & Company suffered any loss by not receiving the full amount of the Oregon pine lumber purchased by them from the Pacific Export Lumber Company, please state what that loss amounted to in money.

(Deposition of W. Hunter.)

THIRTEENTH INTERROGATORY.

If you say there was a loss, please explain how you calculate it.

FOURTEENTH INTERROGATORY.

At this time, during the latter part of the year 1917, what were the most valuable sizes of lumber in the Bombay market?

FIFTEENTH INTERROGATORY.

Did this cargo carried by the "Saigon Maru" contain the proportion of these more valuable sizes for which Gillanders, Arbuthnot & Company had contracted?

SIXTEENTH INTERROGATORY.

If there was a shortage in the delivery of these more valuable sizes, please state the amount of that shortage as nearly as you can.

SEVENTEENTH INTERROGATORY.

If, by reason of the failure to receive the amount of these more valuable sizes contracted for, Gillanders, Arbuthnot & Company suffered any loss in addition to such loss as you may have stated in answer to the Twelfth Interrogatory, please state what that additional loss amounted to.

EIGHTEENTH INTERROGATORY.

Does Gillanders, Arbuthnot & Company hold the Pacific Export Lumber Company liable in damages for failure to deliver the full amount of Oregon pine lumber contracted for, and if so, what is the total

(Deposition of W. Hunter.)

amount of damages which it claims against the Pacific Export Lumber Company?

WOOD, MONTAGUE, HUNT & COOKINGHAM

and

ERSKINE WOOD,

Proctors for Libelant.

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

CROSS-INTERROGATORIES.

PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libelant,

vs.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.,

Respondent,

OSAKA SHOSEN KAISHA, a corporation organized and existing under the laws of Japan,

Claimant.

Now comes the above named claimant, Osaka Shosen Kaisha, and, reserving and not waiving its objections as to the competency, materiality or relevancy of the interrogatories propounded by libelant's proctors to the witness W. Hunter, named in the attached stipulation and libelant's interrogatories, or of the answers of said witness to said interrogatories or any of them, propounds to said witness the following cross-interrogatories:

(Deposition of W. Hunter.)

FIRST CROSS-INTERROGATORY.

What persons, firms or corporations, if any, were, during the latter half of 1917, engaged at Bombay in the business of buying Oregon pine lumber?

SECOND CROSS-INTERROGATORY.

What persons, firms or corporations were, during said time, engaged at Bombay in the business of selling Oregon pine lumber?

THIRD CROSS-INTERROGATORY.

During said time were there any lumber yards at Bombay or vicinity having on hand stocks of Oregon pine lumber for sale? If so, state the names thereof and who were the owners of the same.

FOURTH CROSS-INTERROGATORY.

Is it not a fact that during said period the only user of Oregon pine lumber was the Government of India?

FIFTH CROSS-INTERROGATORY.

Is it not a fact that all Oregon pine lumber imported into Bombay during said period was for the Government of India?

SIXTH CROSS-INTERROGATORY.

If in answer to libelant's fifth interrogatory you have answered that Gillanders, Arbuthnot & Company did purchase a quantity of Oregon pine lumber from the Pacific Export Lumber Company of Portland, Oregon, for delivery in Bombay by the Japanese steamer "Saigon Maru", in the latter part of 1917, please state whether you in turn sold said

(Deposition of W. Hunter.)

lumber, and if so, to whom, giving in full the name and address of the purchaser.

SEVENTH CROSS-INTERROGATORY.

If you have answered that you did purchase such lumber as stated in the foregoing interrogatory, and afterwards sold the same, please state whether you sold it to Chatanee Native Timber Merchants, and, if so, did said merchants sell the same to the Government of India?

EIGHTH CROSS-INTERROGATORY.

If you have answered that you did purchase such lumber as stated in the foregoing interrogatory, and afterwards sold the same, please state whether you sold it to the Government of India through the agency of Chatanee Native Timber Merchants and if so, what commission was paid to them by Gillanders, Arbuthnot & Company for making said sale.

NINTH CROSS-INTERROGATORY.

If you have answered that you purchased the lumber from the Pacific Export Lumber Company at the time and in the manner mentioned in libelant's fifth interrogatory, and that you sold the same, please state if you know to whom and for what purpose it was ultimately delivered.

TENTH CROSS-INTERROGATORY.

If you have answered libelant's fifth and sixth interrogatories in the affirmative, please state whether the contract therein referred to was oral or in writing.

(Deposition of W. Hunter.)

ELEVENTH CROSS-INTERROGATORY.

If in answer to libelant's eleventh interrogatory you have stated the market price of Oregon pine lumber of the kind therein mentioned, at the time and place therein stated, please state whether the market price given by you is based upon the sales made at wholesale or at retail.

TWELFTH CROSS-INTERROGATORY.

If in answer to libelant's eleventh interrogatory you have stated the market price of Oregon pine lumber of the kind therein mentioned, at the time and place therein stated, please state whether the market price given by you is based upon sales made by the Bombay importer or importers of the lumber or those made by subsequent purchasers from such importer or importers.

THIRTEENTH CROSS-INTERROGATORY.

If in answer to libelant's eleventh interrogatory you have stated the market price of Oregon pine lumber of the kind therein mentioned, at the time and place therein stated, please give instances of sales at Bombay of Oregon pine lumber upon which you base your opinion as to its market price, giving the dates of the purchases, the conditions thereof, the names of the sellers and purchasers, the quantity sold, and the price paid, and the general description of the dimensions and finish or lack of finish of the lumber so sold, and for what and whose use the same were sold.

(Deposition of W. Hunter.)

FOURTEENTH CROSS-INTERROGATORY.

If in answer to libelant's eleventh interrogatory you have stated the market price of Oregon pine lumber of the kind therein mentioned, at the time and place therein stated, is the market price given by you based upon sales made to wholesalers and jobbers or to the ultimate consumers.

FIFTEENTH CROSS-INTERROGATORY.

Is it not a fact that during the latter half of 1917 Gillanders, Arbuthnot & Company were the only merchants who imported lumber or timber from America into Bombay?

SIXTEENTH CROSS-INTERROGATORY.

Is it not a fact that during the latter half of 1917 Gillanders, Arbuthnot & Company were the only importers of lumber from America engaged in the sale of the same at Bombay?

SEVENTEENTH CROSS-INTERROGATORY.

Is it not a fact that during the latter half of the year 1917 Gillanders, Arbuthnot & Company were the only merchants who were engaged in the business of importing lumber into Bombay from America for purposes of sale?

EIGHTEENTH CROSS-INTERROGATORY.

Is it not a fact that during the latter half of the year 1917 Gillanders, Arbuthnot & Company were the only merchants engaged in the business of importing into Bombay for sale Oregon pine or Douglas fir lumber or timber?

(Deposition of W. Hunter.)

NINETEENTH CROSS-INTERROGATORY.

Is it not a fact that the only Oregon pine lumber or timber sold in Bombay during the latter half of the year 1917 was lumber or timber that had been imported and sold by Gillanders, Arbuthnot & Company?

TWENTIETH CROSS-INTERROGATORY.

Is it not a fact that during the first half of the month of August, 1917, Gillanders, Arbuthnot & Company were the only merchants who imported lumber or timber from America?

TWENTY-FIRST CROSS-INTERROGATORY.

Is it not a fact that during the first half of the month of August, 1917, Gillanders, Arbuthnot & Company were the only importers of lumber from America engaged in the sale of the same at Bombay?

TWENTY-SECOND CROSS-INTERROGATORY.

Is it not a fact that during the first half of the month of August, 1917, Gillanders, Arbuthnot & Company were the only merchants who were engaged in the business of importing lumber into Bombay from America for purposes of sale?

TWENTY-THIRD CROSS-INTERROGATORY.

Is it not a fact that during the first half of the month of August, 1917, Gillanders, Arbuthnot & Company were the only merchants engaged in the business of importing into Bombay for sale Oregon pine or Douglas fir lumber or timber?

(Deposition of W. Hunter.)

TWENTY-FOURTH CROSS-INTERROGATORY.

Is it not a fact that the only Oregon pine lumber or timber sold in Bombay during the first half of the month of August, 1917, was lumber or timber that had been imported and sold by Gillanders, Arbuthnot & Company?

TWENTY-FIFTH CROSS-INTERROGATORY.

Please describe specifically and give the amount of lumber and timber which you say Gillanders, Arbuthnot & Company purchased from the Pacific Export Lumber Company and which was actually delivered to Gillanders, Arbuthnot & Company ex S. S. "Saigon Maru".

TWENTY-SIXTH CROSS-INTERROGATORY.

Please state what amount of import customs duties were paid upon the lumber and timber bought by and delivered to Gillanders, Arbuthnot & Company at Bombay ex S. S. "Saigon Maru", upon the entry of the same at the customs house in Bombay.

TWENTY-SEVENTH CROSS-INTERROGATORY.

What is the amount of insurance premiums, if any, paid by Gillanders, Arbuthnot & Company for insurance upon the lumber and timber purchased and delivered aforesaid at Bombay ex S. S. "Saigon Maru" in the early part of August, 1917?

TWENTY-EIGHTH CROSS-INTERROGATORY.

If in your testimony you have stated the market value of Oregon pine lumber or timber at Bombay, India, in the latter half of the year 1917, please

(Deposition of W. Hunter.)

state whether the market value given by you is the market value f. o. b. vessel in the port of Bombay or its market value in the City of Bombay after it passed the customs and the import duties had been paid thereon.

TWENTY-NINTH CROSS-INTERROGATORY.

If you have answered that you purchased a quantity of Oregon pine lumber from the Pacific Export Lumber Company which was delivered to you at Bombay, India, ex S. S. "Saigon Maru", please state whether this lumber was delivered directly from the ship to your dock, and if not, upon what dock.

THIRTIETH CROSS-INTERROGATORY.

If in answer to the foregoing interrogatory you say that the lumber in question was not delivered to you directly on your dock from the steamer, please state whether the market value of Oregon pine lumber which has been given by you as the market value on the dock from which it was unloaded from the steamer was the market value in your own yards at Bombay.

F. H. HUFFER, W. H. HAYDEN,
and

HUFFER & HAYDEN,

Proctors for Claimant.

(Deposition of W. Hunter.)

DEPOSITION OF WILLIAM HUNTER OF CALCUTTA, INDIA, MADE UNDER OATH BEFORE THE CONSUL GENERAL OF THE UNITED STATES OF AMERICA, CALCUTTA, INDIA, this 24th day of July, 1918.

In the Case of
PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libelant,

v.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.

Respondent,

OSAKA SHOSEN KAISHA, a corporation organized and existing under the laws of Japan,

Claimant.

TO THE FIRST INTERROGATORY HE SAITH:

William Hunter, 38 years of age, of Calcutta, India, Assistant in Charge of the Timber Department of the Office of Gillanders, Arbuthnot & Co., Calcutta.

TO THE SECOND INTERROGATORY HE
SAITH:

Assistant in charge of the Timber Department of the Office of Gillanders, Arbuthnot & Co., in Calcutta.

TO THE THIRD INTERROGATORY HE SAITH:

I have been engaged for a period of nearly five years as an Assistant in the firm of Messrs. Gillan-

(Deposition of W. Hunter.)

ders, Arbuthnot & Co., managing their Timber Department. I was in Bombay during July, 1917, in connection with Oregon pine business. The management of the timber business of the firm in Bombay is controlled from Calcutta. My firm does the largest business in Oregon pine timber in India and I am in constant daily touch with the market prices both in Calcutta and Bombay in connection with the large business dealings of the firm in this class of timber.

TO THE FOURTH INTERROGATORY HE
SAITH:

Yes.

TO THE FIFTH INTERROGATORY HE SAITH:

Yes.

TO THE SIXTH INTERROGATORY HE SAITH:

Yes.

TO THE SEVENTH INTERROGATORY HE
SAITH:

5,500 tons (10 per cent more or less) @ £9.0.0 per ton of 50 cubic feet C. I. F. Bombay including War risk.

TO THE EIGHTH INTERROGATORY HE
SAITH:

4,550 tons was delivered in Bombay by the Japanese Steamer "Saigon Maru".

TO THE NINTH INTERROGATORY HE SAITH:

After allowing for 10 per cent variation under the contract the shortage in the delivery of this timber amounted to 400 tons.

(Deposition of W. Hunter.)

TO THE TENTH INTERROGATORY HE SAITH:

2d August, 1917.

**TO THE ELEVENTH INTERROGATORY HE
SAITH:**

I know of no transactions in the Bombay market in this particular class of timber on the 2d August, 1917, but the rate prevailing would be approximately that ruling on the 31st July, 1917, when we sold this cargo to arrive at Rs. 165/— per ton of 50 cubic feet C. I. F. Bombay. This is the only transaction that I have knowledge of as having taken place up to and at the time the "Saigon Maru" arrived in Bombay.

**TO THE TWELFTH INTERROGATORY HE
SAITH:**

Gillanders, Arbuthnot and Company suffered loss to the extent of £1,075.

**TO THE THIRTEENTH INTERROGATORY HE
SAITH:**

The loss is represented by the difference in market price (as arrived at by me) and the contract rate viz., £2.13.9 per ton on 400 tons.

**TO THE FOURTEENTH INTERROGATORY HE
SAITH:**

12-inch squares.

**TO THE FIFTEENTH INTERROGATORY HE
SAITH:**

No.

(Deposition of W. Hunter.)

TO THE SIXTEENTH INTERROGATORY HE
SAITH:

755 tons which represents the proportion of the more valuable sizes for which Gillanders, Arbuthnot & Company had contracted.

TO THE SEVENTEENTH INTERROGATORY
HE SAITH:

The additional loss sustained by Gillanders, Arbuthnot & Company amounted to Rs. 1/— to Rs. 2/— per ton on the total quantity of 4,550 tons delivered.

TO THE EIGHTEENTH INTERROGATORY HE
SAITH:

Yes. £1,075 and Rs. 1/— to Rs. 2/— per ton upon the total quantity delivered.

TO THE FIRST CROSS-INTERROGATORY HE
SAITH:

M. M. H. J. M. Chotani (an Indian Timber Merchant) and Gillanders, Arbuthnot & Company.

TO THE SECOND CROSS-INTERROGATORY
HE SAITH:

M. M. H. J. M. Chotani (an Indian Timber Merchant) and Gillanders, Arbuthnot & Company.

TO THE THIRD CROSS-INTERROGATORY HE
SAITH:

Yes: There were timber yards in and around Bombay and in the vicinity to the best of my knowledge and belief and the names and owners thereof were (1) Gillanders, Arbuthnot & Company and (2) M. M. H. J. M. Chotani.

(Deposition of W. Hunter.)

**TO THE FOURTH CROSS-INTERROGATORY
HE SAITH:**

It is not a fact that during the said period the only user of Oregon pine timber was the Government of India. There were other users in Bombay who to the best of my knowledge and belief bought this class of timber from Chotani.

**TO THE FIFTH CROSS-INTERROGATORY HE
SAITH:**

It is not a fact that all Oregon pine timber imported into Bombay during the said period was for the Government of India. The Government of India only came into the market if and when they were buyers. In point of fact Gillanders, Arbuthnot & Company, in the ordinary course of their dealings offered the timber purchased from the Pacific Export Lumber Company, and carried on the "Saigon Maru", to Government as large and substantial buyers but the responsible officer of Government of Simla refused it as they did not require it and so it was offered and sold to Chotani. I do not accept the suggestion that all shipments of this class of timber to India were expressly made for the Government of India.

**TO THE SIXTH CROSS-INTERROGATORY HE
SAITH:**

Yes. We sold the said Timber to M. M. H. J. M. Chotani, an Indian timber merchant of Bombay.

(Deposition of W. Hunter.)

**TO THE SEVENTH CROSS-INTERROGATORY
HE SAITH:**

Gillanders, Arbuthnot & Company sold the said timber to M. M. H. J. M. Chotani, an Indian Timber Merchant, who in turn sold it to various buyers including the Government of India.

**TO THE EIGHTH CROSS-INTERROGATORY
HE SAITH:**

Gillanders, Arbuthnot & Company did not sell the timber to the Government of India through the agency of M. M. H. J. M. Chotani or at all, but to M. M. H. J. M. Chotani as principal. Gillanders, Arbuthnot & Company had no interest whatsoever in the subsequent sale by Chotani to Government.

**TO THE NINTH CROSS INTERROGATORY HE
SAITH:**

The timber was resold by Chotani to various buyers but for what purpose it was ultimately delivered is not known.

**TO THE TENTH CROSS INTERROGATORY HE
SAITH:**

The contract was contained in letters and telegrams.

**TO THE ELEVENTH CROSS INTERROGATORY
HE SAITH:**

The market price given by me in reply to libellant's eleventh interrogatory is based on Gillanders, Arbuthnot & Co.'s sale to Mr. Chotani.

(Deposition of W. Hunter.)

TO THE TWELFTH, THIRTEENTH AND
FOURTEENTH CROSS INTERROGATORIES
HE SAITH:

The above reply answers these questions also.

TO THE FIFTEENTH CROSS INTERROGA-
TORY HE SAITH:

It is not a fact that during the latter half of 1917 Gillanders, Arbuthnot & Co. were the only merchants who imported timber from America to Bombay. Chotani also imported cargo of this kind, e. g., on the SS "Neils Nelson."

TO THE SIXTEENTH CROSS INTERROGA-
TORY HE SAITH:

It is not a fact that during the latter half of 1917 Gillanders Arbuthnot & Co. were the only importers of lumber from America engaged in the sale of the same at Bombay. M. M. H. J. M. Chotani was also engaged in the sale of the same at Bombay.

TO THE SEVENTEENTH CROSS INTERROGA-
TORY HE SAITH:

It is not a fact that during the latter half of the year 1917 Gillanders, Arbuthnot & Co. were the only merchants who were engaged in the business of importing lumber into Bombay from America for the purposes of sale. M. M. H. J. M. Chotani was also engaged in the business of importing lumber into Bombay from America for purposes of sale.

(Deposition of W. Hunter.)

TO THE EIGHTEENTH CROSS INTERROGA-
TORY HE SAITH:

It is not a fact that during the latter half of the year 1917 Gillanders, Arbuthnot & Co. were the only merchants engaged in the business of importing into Bombay for sale Oregon pine or Douglas fir lumber or timber. M. M. H. J. M. Chotani was also so engaged.

TO the NINETEENTH CROSS INTERROGA-
TORY HE SAITH:

It is not a fact that the only Oregon pine lumber or timber sold in Bombay during the latter half of the year 1917 was lumber or timber that had been imported and sold by Gillanders, Arbuthnot & Co. Chotani also imported and sold this class of timber.

TO THE TWENTIETH CROSS INTERROGA-
TORY HE SAITH:

It is not a fact that during the first half of the month of August, 1917, Gillanders, Arbuthnot & Co. were the only merchants who imported lumber or timber from America. Other parties were importing American timber at about this time but whether or not direct from America I cannot say.

TO THE TWENTY-FIRST CROSS INTERROGA-
TORY HE SAITH:

I have no knowledge beyond what I have stated in answer to No. 20.

(Deposition of W. Hunter.)

TO THE TWENTY-SECOND AND TWENTY-THIRD CROSS INTERROGATORIES

HE SAITH:

See my answer to No. 20.

TO THE TWENTY-FOURTH CROSS INTERROGATORY HE SAITH:

I am not aware of this.

TO THE TWENTY-FIFTH CROSS INTERROGATORY HE SAITH:

Gillanders, Arbuthnot & Co. purchased 5,500 tons (10 per cent more or less) and the quantity delivered was 4,550 tons. Specification of the timber purchased and delivered can if required be obtained from the Pacific Export Lumber Company.

TO THE TWENTY-SIXTH CROSS INTERROGATORY HE SAITH:

Gillanders, Arbuthnot & Co. sold on c.i.f. terms therefore custom was paid by the buyer.

TO THE TWENTY-SEVENTH CROSS INTERROGATORY HE SAITH:

The timber was purchased by Gillanders, Arbuthnot & Co., c.i.f. Bombay.

TO THE TWENTY-EIGHTH CROSS INTERROGATORY HE SAITH:

The timber was sold by Gillanders, Arbuthnot & Co. @ Rs. 165/— per ton of 50 cubic feet c.i.f. Bombay.

(Deposition of W. Hunter.)

TO THE TWENTY-NINTH CROSS INTERROG-
ATORY HE SAITH:

The timber was delivered overside "Saigon Maru" to our buyer.

TO THE THIRTIETH CROSS INTERROGA-
TORY HE SAITH:

The market value given by me is the c.i.f. value Bombay.

EMPIRE OF INDIA,
Province of Bengal, } ss.
City of Calcutta.

I, William Hunter, being first duly sworn, say that I am one of the witnesses in the above entitled cause; that I am familiar with the contents of the within deposition and that the allegations therein contained are true, as I verily believe.

W. HUNTER,

Consulate General of the United States of
America, Calcutta, India, July 24, 1918.

Subscribed and sworn to before me this 24th day
of July, 1918.

JAS. A. SMITH,

Consul General of the United States of America.
(Seal American Consulate General, Calcutta,
India.)

Filed, October 19, 1918, G. H. Marsh, Clerk.

(Deposition of Y. Yamamoto.)

DEPOSITION OF Y. YAMAMOTO—A Witness
for Claimant.

STIPULATION.

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a cor-
poration, Libellant,

v.

THE JAPANESE STEAMER "SAIGON MARU,"
her tackle, apparel, etc., Respondent,

OSAKA SHOSEN KAISHA, a corporation organ-
ized and existing under the laws of Japan,
Claimant.

IT IS STIPULATED and AGREED by and be-
tween the above named libellant, Pacific Export
Lumber Company, and the above named claimant,
Osaka Shosen Kaisha, through their respective
proctors, that the deposition de bene esse of Y. Yam-
amoto, a witness on behalf of said claimant, may
be taken in the office of Huffer & Hayden, 410 Fi-
delity Building, in the City of Tacoma, Washing-
ton, on Tuesday, the 12th day of February, 1918,
at the hour of 10 o'clock A. M. of said day, upon
oral interrogatories and cross-interrogatories be-
fore C. D. Savery, a notary public in and for the
State of Washington, residing in said city, without
commission or other authority or power and without

(Deposition of Y. Yamamoto.)

notice; and the taking of said deposition may be adjourned from time to time to suit the convenience of such notary and said witness. The certificate and seal of said notary shall be sufficient proof of his name, signature and official character without other and further authentication or proof; and any and all preliminaries to the taking of such deposition required by law or rule of court are hereby dispensed with, and the signature of said witness to such deposition is hereby waived. Said deposition when taken shall be enclosed in a sealed envelope by said notary and directed to the clerk of the above entitled court, and either delivered to said clerk by said notary or transmitted to said clerk through the mail or by some private person, and may be read in evidence by either party, subject only to the objections (to be taken at the time of the examination of said witness) as to the competency, materiality or relevancy of the testimony therein set forth. And all other objections thereto and all objections to the taking of said deposition as aforesaid, are hereby expressly waived.

Dated this 12th day of February, 1918.

ERSKINE WOOD,
Of Proctors for Libellant.
F. A. HUFFER
and
W. H. HAYDEN,
Of Huffer & Hayden,
Proctors for Claimant.

(Deposition of Y. Yamamoto.)

No. 7467.

*In the District Court of the United States for the
District of Oregon.*

PACIFIC EXPORT LUMBER COMPANY, a cor-
poration, Libelant,

v.

THE JAPANESE STEAMER "SAIGON MARU,"
her tackle, apparel, etc., Respondent,

OSAKA SHOSEN KAISHA, a corporation organ-
ized and existing under the laws of Japan,
Claimant.

DEPOSITION OF Y. YAMAMOTO, taken on be-
half of the above named claimant, pursuant to
annexed stipulation, at 410 Fidelity Building,
Tacoma, Washington, on the 12th day of Febru-
ary, 1918.

The libelant appearing by Mr. Erskine Wood,
of proctors for libelant;

The claimant appearing and being represented
by its proctors, Messrs. Huffer & Hayden.

Whereupon the following proceedings were had
and done, to wit:

Whereupon Mr. M. Takahashi was duly sworn
as interpreter in the taking of said deposition.

Mr. Hayden: It is understood that the witness
will testify himself in English as far as possible,
the interpreter being called upon when necessary
to explain and interpret the questions or answers.

(Deposition of Y. Yamamoto.)

Y. YAMAMOTO, a witness produced and sworn on behalf of the claimant; testified as follows:

DIRECT EXAMINATION.

(By Mr. Hayden)

Q. What is your name?

A. Yoshio Yamamoto.

Q. How old are you?

A. Forty-one.

Q. Were you the master of the "Saigon Maru" that loaded in Portland in June, 1917?

A. Yes.

Q. You were loading for the Pacific Export Lumber Company a cargo of lumber for Bombay, were you, in May and June, 1917? (Question interpreted to witness by the interpreter.)

A. Yes, sir.

Q. What schooling and preparation have you had to become an officer of vessels? (Question interpreted.)

A. I finished my school in a nautical college in Tokio.

Q. What is the name of it?

A. Shoshen Gakko at Tokio; that means nautical college. I finished in the nautical college in Tokio in 1901.

Q. How many years did you attend that college?

A. Five and a half years.

Q. Is that nautical college the Imperial College of Japan?

(Deposition of Y. Yamamoto.)

A. Yes; that is the highest school in Japan for navigation.

Q. Is five and a half years the regular course, the regular time it takes to go through?

A. Two years in the school, and the other three years sailings in steamers for the practical training, and the other half year in the Japanese navy, to learn gunning; so that it is altogether five and a half years.

Q. After you finished your college, what position did you take at sea?

A. After I completed my college I joined the Osaka Shosen Kaisha.

Q. That is the same company in this suit?

A. Yes; as second officer.

Q. On what kind of a vessel?

A. A steamer.

Q. How long did you remain second officer?

A. About two years.

Q. What was your next position?

A. Chief officer.

Q. How long did you remain chief officer?

A. About three years.

Q. And your next position was what?

A. Captain.

Q. How long have you remained captain?

A. Until today; about twelve years.

Q. Have you always worked for the Osaka Shosen Kaisha?

A. Yes, sir.

(Deposition of Y. Yamamoto.)

Q. Nobody else has employed you?

A. No, sir; the Osaka Shosen Kaisha only.

Q. During these years at sea, what parts of the world have you been navigating the waters of?

A. The whole part of the Japanese coast and the China coast, the Korea coast, and from Japan to Java; the Java line, and Bombay line from Japan to Bombay, and American line from Japan to America.

Q. How long were you master of the "Saigon Maru" prior to May and June, 1917?

A. About one year and seven months.

Q. And how long after May and June, 1917, were you master of the "Saigon Maru"?

A. Until January, this year. I left "Saigon Maru" on the 16th of January, 1918.

Q. Are you master of a steamer now?

A. Yes.

Q. What steamer?

A. Canada Maru.

Q. And where is the Canada Maru now?

A. At the Milwaukee Dock, in Tacoma.

Q. When is she going away?

A. It is expected to go on the 14th of this month.

Q. Are you going as master of her?

A. Yes.

Q. What waters did you sail in while you were master of the "Saigon Maru"?

(Deposition of Y. Yamamoto.)

A. Mainly the Bombay line from Japan to Bombay, except extra voyage from Japan to Portland.

Q. How many voyages did you make from Japan to Portland in the "Saigon Maru"?

A. One.

Q. That is the voyage on which you took lumber?

A. Yes. Except that voyage during which I took the captain's place on the "Saigon Maru," I ran the Bombay line from Japan to Bombay.

Q. Did you make any trip from America to Japan or the China waters or Indian Ocean waters on any other steamer than the "Saigon Maru"?

A. To America I made one other trip on a steamer as captain.

Q. How long ago was that?

A. About two years ago or two and a half now. (Interpreter). I made a voyage as captain of the steamer Panama Maru from here to Japan about two years and a half ago.

Q. Did you make a voyage from Japan or the Indian Ocean to America in any other capacity than as master? (Question interpreted.)

A. No, I never had any voyage as officer from Japan to Bombay and thence to America.

Q. Then you were only to America once before as captain and never as officer? (Question interpreted.)

A. No, sir.

Q. In running from Japan through the China

(Deposition of Y. Yamamoto.)

Sea to Singapore and Bombay, what kinds of cargo did you take in your vessels?

A. From Japan to Bombay general cargo,—several kinds.

Q. And from Japan to Singapore?

A. Bombay line from Japan to Bombay calling Hong Kong, Singapore, Port Switenham.

Q. And from Switenham where?

A. Penang and Colombo which was a coaling port.

Q. Do they carry any deck cargoes from Japan to any of those ports on the steamers regularly running there?

A. Sometimes.

Q. Please explain?

A. From Japan to Bombay I take a quantity of deck cargo sometimes, except typhoon seasons in the China Sea and southwest monsoon season in the Indian Ocean. At other seasons, I take some quantity of cargo if necessitated.

Q. What is the typhoon season in the China Sea?

A. From June, July, August, September, October; those five months is the typhoon season in the China Sea. July, August and September, those three months is the strongest time of the typhoon in the China Sea.

Q. And when is the southwest monsoon season in the Indian Ocean?

A. From June, July, August, September and

(Deposition of Y. Yamamoto.)

October; about five months, is the southwest monsoon season in the Indian Sea.

Q. On the voyage from Portland to Bombay, what is the usual route leaving in June from Portland, including stopping places for coal?

A. We take coal at some port of Japan or Singapore or Hong Kong.

Q. And what route did you take when you left Portland for Bombay, and what ports did you touch at on that route?

A. Portland to Nagasaki.

Q. Then the next point of touching?

A. The next point was Singapore, and the next point Bombay.

Q. I asked you the other day to mark out your route on a chart?

A. Yes, sir.

Q. Is this line in red shown on this map approximately the course you took from Portland,—this map marked Plaintiff's Exhibit 1, Yamamoto?

A. Yes, sir.

Q. These figures in lead pencil, 6, 7, 8, 9, 10, 11, 12, etc., what are those?

A. Those are the noon positions of my steamer on those dates.

Q. The numbers represent the dates of the month of June?

A. Yes, sir.

Q. You left Portland on June 5, 1917?

A. Yes, sir.

(Deposition of Y. Yamamoto.)

Q. And arrived at Nagasaki on what date?

A. The second of July.

Q. Does the red line on this chart, marked Exhibit No. 2, show your course from Nagasaki to Singapore?

A. Yes, sir.

Q. And the lead pencil numbers show your position at noon on the dates mentioned?

A. Yes, sir.

Q. And this was during the month of July, 1917?

A. Yes, sir.

Q. You arrived at Singapore on what date?

A. The 17th of July.

Q. Now, referring back to your Exhibit No. 1, and to the extreme right hand side of it, what does this red line represent from Singapore to Bombay?

A. This is my actual sailing track from Singapore to Bombay.

Q. And you arrived at Bombay when?

A. On the second of August, 1917.

Q. About what time?

A. About three o'clock.

Q. I have it put down at 12:50 P. M.

A. Well, maybe that; just around there.

Q. These pencil numbers, 18, 19, 20, 21, 22, etc., on your course show what?

A. The noon positions on those dates.

Q. That is, you left Singapore July 17th?

A. Yes, sir.

(Deposition of Y. Yamamoto.)

Q. And arrived at Bombay August 2nd?

A. Yes, sir.

Mr. Hayden: I now introduce in evidence these two charts as our exhibits.

Whereupon said charts were marked Claimant's Exhibit No. 1, Yamamoto, and Claimant's Exhibits No. 2, Yamamoto.

Q. Referring to your exhibits Nos. 1 and 2, and your courses and dates; where did you get the information to put these courses and dates down on these charts? (Interpreted.)

A. From my log book.

Q. Now, I have here what purports to be a letter from the Pacific Export Lumber Company, dated June 4, 1917, and addressed to Y. Yamamoto. Are you the Y. Yamamoto referred to in this letter?

A. Yes, sir.

Q. Did you receive that letter from the Pacific Export Lumber Company?

A. Yes, sir.

Mr. Hayden: I offer this in evidence as Claimant's Exhibit No. 3.

Whereupon said document was marked Claimant's Exhibit No. 3, Yamamoto.

Q. This letter instructs you to proceed to Bombay via Nagasaki?

A. Yes, sir.

Q. What is the regular route for steamers from Nagasaki to Bombay; is it the route shown on the chart by the red line?

(Deposition of Y. Yamamoto.)

A. The same.

Q. You took the regular route on that trip from Nagasaki to Bombay?

A. I will answer that in Japanese. (Interpreted.) I took this course at that particular season.

Q. And is that the regular course of steamers at that particular season? (Interpreted.)

A. Yes, sir.

Q. Is there any other course regularly taken by steamers to go from Nagasaki to Bombay than through the China Sea and Indian Ocean?

A. There is a little difference in courses according to the captain of several vessels.

Q. Do all those courses take you through the China Sea and Indian Ocean? (Interpreted.)

A. Yes, that is the regular course.

Q. That is, do all steamers making that trip regularly go through the China Sea and Indian Ocean on substantially the same course that you have put down here?

A. The majority of them.

Q. In going from Nagasaki to Bombay do any of the steamers on the regular course escape the China Sea? (Interpreted.)

A. They all go through the China Sea regularly.

Q. What is the kind of weather that may be expected in the China Sea during the month of July?

A. (Interpreted.) During the month of July

(Deposition of Y. Yamamoto.)

on the China Sea it is the season of the fearful typhoon which frequently attacks the ship.

Q. And during the month of July and the fore part of August, what is the kind of weather you may expect ordinarily going from Singapore to Bombay? (Question and answer interpreted.)

A. In that season on the Indian Ocean is the violent southwest monsoon season,—the middle of the season. (Answering direct) I expect to meet the southwest gale.

Q. Now, Captain, in the China Sea, where you expect during this season to meet the typhoon, what general direction does the typhoon come from?

A. (Interpreted.) There is no uniform direction of a typhoon.

Q. Now, in the Indian Ocean, from what direction does the monsoon blow?

A. From the southwestward.

Q. What is the general direction of your course from Colombo to Bombay?

A. From Colombo to Bombay, my general course is nearly northwest.

Q. How do the winds and seas strike the vessel in your course from Colombo to Bombay?

A. The sea will attack my steamer from my port beam.

Q. What kind of seas are they that you expect to meet at this season from Colombo to Bombay? (Assisted by interpreter.)

A. Generally, on that ocean the strong south-

(Deposition of Y. Yamamoto.)

west wind blows continuously, and blows with violent and vehement waves and high swell, at that season. Sometimes the wind in that season might be quiet, but generally it is continuously blowing hard, with much rain, continuous rain. It is called the rainy season.

Q. What kind of seas does the ship expect to meet at this season on the trip from Ceylon to Bombay?

A. Generally the strong, long southwest swell.

Q. What does the swell do to the vessel?

A. (Interpreted) It causes the rolling of the vessel, and that is most dangerous to the ship.

Q. Describe the extent of the rolling?

A. (Interpreted) Of course there is a difference according to the wind and waves, but it rolls violently and tremendously.

Q. Are these monsoons accompanied at times by very big winds during that season?

A. (Interpreted) Comparatively speaking, the wind is not so high. I might indicate that by the numbers 6 to 7.

Q. That is the Beaufort scale?

A. Yes. But the sea swell is harder than the power of the wind. Generally the wind and sea come together in the same degree, but on the Indian Ocean the sea swell is harder comparatively than the wind.

Q. Does this sea swell coming on the beam

(Deposition of Y. Yamamoto.)

break and go over the ship as a rule on that trip at that season of the year?

A. Continuously on the voyage the dashing of the waves is up on the deck.

Q. Have you in your experience in the China Sea ever been in a typhoon?

A. Yes, I met with a typhoon on the China Sea very often.

Q. Describe the conditions of the wind and sea in a typhoon such as you might expect to meet in the China Sea.

Mr. Hayden: It is understood that in all these questions I refer to this particular season of the year.

A. (Interpreted) Do you mean that strong typhoon or the common typhoon; there are two kinds. One is not so strong and one very strong?

Q. I mean the kind that you might expect to meet during that voyage; whatever you expect to meet at that season?

A. (Interpreted) There might occur such a strong storm as to wreck the ship.

Mr. Wood: With or without a deck load?

A. (Interpreted) With or without deck cargo; it is the same when the vessel meets the strong typhoon; it would not avoid a wrecking of the ship. I will correct my answer. With or without the deck cargo it is the same for any vessel which encounters the strong typhoon in that season, which might result in the wreck of the ship; that is, it

(Deposition of Y. Yamamoto.)

may occur, because the typhoon is strong. (Direct)
If it is in the center of the typhoon. (Interpreted)
And I wish to emphasize the danger to the ship in
such a season with a heavy deck load.

Q. Do you expect these typhoons to be met often
or otherwise in the month of July in the China Sea?
(Interpreted.)

A. Yes.

Q. How about—how often in July?

A. Two or three days.

Q. Do you say they occur every three days?

A. About.

Q. Now, what kind of typhoons do you refer to?

A. All kinds; sometimes bad, sometimes not so
dangerous; sometimes very dangerous.

Q. And how often do you expect to meet a ter-
rible typhoon in July?

A. That may be three or four times.

Q. What effect has the big typhoon on the
ocean and on the ship? (Interpreted.)

A. (Interpreted) In the typhoon season there
arises strong and violent winds accompanied with
tremendous sea and heavy rain, lightning and thun-
der, and dashing waves about thirty feet in height,
and the ocean looks like boiling hot water; the sky
is darkened with the storm.

(By Mr. Huffer):

Q. Now, Captain, how many trips have you
taken from Japan to Bombay?

A. Six trips.

(Deposition of Y. Yamamoto.)

Q. How many voyages have you taken through the China Sea?

A. Oh, very often; very often.

Q. About how many?

A. I engaged in the China coast trade about four years as captain; that is, on coast steamer. It takes about two weeks for a trip; so that it would be nearly one hundred trips I have made; that is, around the north part of the China Sea.

Q. How many trips have you made to Bombay with the "Saigon Maru," as master?

A. Six trips.

Q. How does the "Saigon Maru" behave when she is struck by a big wind? (Interpreted.)

A. (Interpreted) You mean with a full cargo?

Q. Speaking generally. When she is loaded with full cargo, without any deck load?

A. (Interpreted) With what kind of wind or sea?

Q. A heavy beam wind?

A. Without deck load it will effect a strong rolling of the vessel.

(By Mr. Hayden) :

Q. What is the danger to the ship and deck load in a big typhoon?

A. It will hurt the stability of the vessel.

Q. But what is the danger to the deck load, if any?

A. There is fear of losing the deck load when the vessel meets such a rolling.

(Deposition of Y. Yamamoto.)

Q. Why is there danger of losing it; what creates that danger?

A. (Interpreted) If there comes a loosening of the deck cargo then also there is fear that the lashing might be cut on the deck load.

Q. Now, you have told it to the interpreter. Please give us the answer in English.

A. I cannot.

Q. Please try.

A. I will try.

Q. In a big typhoon with a deck cargo, how does the sea and the waves affect the deck cargo?

A. In such a case the vessel will roll heavily so that the lumber on deck must get a little loose. When the deck load of lumber is loosing,—our lashings is very strong; I fix it proper, so that if the lumber does not get loose, it is all right, but if the lumber is loosed by the heavy rolling of the ship, our lashing ropes may be slack (assisted by interpreter) or carry away; and that is very dangerous; and also if the lashing rope is somewhat loose, the lumber goes to one side a little.

Q. Does the water come on deck in a typhoon?

A. Yes.

Q. How much water on the deck?

A. All the time the deck is flooded.

Q. What effect may the flooding have on the lumber on deck? (Interpreted.)

A. In heavy sea the deck is wet all the time;

(Deposition of Y. Yamamoto.)

it increases the wetting of the lumber, the waves strike the lumber.

Q. And does a big sea affect the lumber when it hits it?

A. It makes the lumber loose.

Q. And if the lumber comes loose and with a big sea washing over the deck?

A. As I say before, the lashings may be cut or broken.

Q. You say you expect to meet that kind of a typhoon three or four times in July, in the China Sea?

A. Yes.

Q. In the voyage from Japan to Singapore you said sometimes the ships carry deck loads?

A. Yes, sir.

Q. In what seasons do ships carry deck loads, Japan to Singapore?

A. Except the typhoon season.

Q. Do they carry deck loads during the typhoon season?

A. No, never.

Q. What kind of cargoes are usually carried from Japan to Singapore.

A. Not deck cargo.

Q. And what other kind of cargoes?

A. Oh, many kinds, from Japan to Singapore; general cargo; any kind.

Q. Any heavy cargo,—name some cargoes carried there as a rule?

(Deposition of Y. Yamamoto.)

A. Rice, merchandise, cement, Japanese beer, and many things I cannot state now. Mixed cargoes from Japan to Singapore.

Q. What kind of cargo do they carry on deck at other seasons than the typhoon seasons?

A. Deck cargoes sometimes by direction of the company; coal tar and sulphuric acid and explosive cargoes, on deck cargoes; also lumber.

Q. How much in weight do you carry on deck cargo, on the "Saigon Maru"?

A. About one hundred tons in weight, sometimes over.

Q. Why don't you carry that deck cargo during the typhoon season?

A. There are not many deck cargoes; it is not necessary.

Q. But why don't you carry it during the typhoon season?

A. Oh, I understand your question now. If I take deck cargo, it is dangerous in the typhoon season, and I must take care, and so I don't take it.

Q. Now, referring to the time of loading at Portland; what kind of cargo did you load at Portland on this voyage?

A. Lumber.

Q. Anything else?

A. No; all lumber.

Q. How much lumber did you take in the hold, below deck?

A. In the hold,—if I may see my note book.

(Deposition of Y. Yamamoto.)

Q. Very well.

A. 2,436,851 board measure feet in the hold.

Q. And how much did you take on deck?

A. 241,559 feet board measure on deck.

Q. How much did the charterers want you to take on deck?

A. The charterer wanted to take 700,000 board measure altogether on deck.

Q. Was the hold of the ship full of lumber?

A. Yes, all full.

Q. Why did you not take the 700,000 feet that the charterers wanted you to take on deck?

A. For many reasons, but the main reason was if I take charterers' quantity 700,000 board measure,—if I take that lumber my steamer's stability is very bad and so I do not take it; I refuse it.

Please look at this photograph; state what that is a picture of?

A. That is a picture of my steamer,—loading lumber at Portland. This was not at Portland, but it is the same.

Q. Where was the picture taken?

A. At Nagasaki.

Q. Did you see this picture taken?

A. Yes, sir.

Mr. Hayden: I will offer this in evidence.

Said photograph marked Claimant's Exhibit 4, Yamamoto.

Q. And what is this picture?

A. It is the same vessel.

(Deposition of Y. Yamamoto.)

Q. Taken at Nagasaki?

A. Yes, sir.

Q. Did you see it taken?

A. Yes.

Mr. Hayden: We offer the photograph.

Said photograph marked Claimant's Exhibit No.

5, Yamamoto.

Q. And what is this picture?

A. That is the same.

Q. Taken at Nagasaki?

A. Yes, at the same time.

Mr. Hayden: We offer this also.

Whereupon said photograph was marked Claimant's Exhibit No. 6, Yamamoto.

Mr. Wood: I object to the introduction and receiving in evidence of the photographs as substantive evidence, but I admit that they may be used to illustrate the witness's testimony.

Q. Was there any difference in the ship or her deck load at the time she was loaded at Portland and left for sea than is shown in these photographs?

A. The condition of the lumber, the same, as when loading at Portland.

Q. In all these pictures?

A. Yes.

Q. The condition of the lumber was the same.

A. Yes, just the same.

Q. (By Mr. Wood) Were the lashings the same?

A. Yes; everything the same.

(Deposition of Y. Yamamoto.)

Q. Referring to picture Exhibit 4, what part of the ship is that?

A. This is my after deck.

Q. What is this,—house across here?

A. This is our galley.

Q. On what part of the ship?
the after part of the midship house?

Q. The house where this man is standing, is the after part of the mid ship house?

A. Yes.

Q. The photographer was looking forward on the ship?

A. Yes; on the after deck.

Q. The photographer was looking forward?

A. Yes.

Q. This is the aft end of the midship house?

A. The after end of my bridge deck.

Q. I will mark it; I have marked it, aft end of bridge deck, with an arrow coming away from the house.

A. Yes.

Q. Where is your galley?

A. This is my galley, and also here; this is my ice chest.

Q. I will mark this, ice chest, and this, galley.

A. Yes.

Q. And I will mark this, galley, also?

A. Yes.

Q. Referring to picture No. 6, what is that?

A. This is the forepart of my steamer.

(Deposition of Y. Yamamoto.)

Q. What is this in the upper part of the picture?

A. This is the after end of the forecastle deck.

Q. I will mark this, aft end of the forecastle deck?

A. Yes.

Q. This picture is taken looking forward?

A. Yes, sir.

Q. Now, referring to picture Exhibit 5; what does that show?

A. This is a side view of the fore part of my steamer. It is a side view of this picture (indicating).

Q. That is a side view of picture No. 6?

A. Yes.

Q. Off to the right hand side of the picture is what?

A. That is the after part of my forecastle deck.

Q. I will mark it, after part forecastle deck?

A. Yes.

Q. This is the forward deck load of lumber?

A. Yes.

Q. I will mark it then, forward deck load of lumber?

A. Yes.

Q. I notice by these pictures, the forward deck load comes above the rail?

A. Yes, sir.

Q. And the after deck load comes how, with reference to the rail?

A. Just the same level with the rail.

(Deposition of Y. Yamamoto.)

Q. What is this which I point out with my pencil?

A. That is the top surface of my bulwark.

Q. I will mark this, top surface of bulwark?

A. Yes.

Q. What is this rod running along just by the head of the man standing at the right of the picture?

A. That is our steering rod running from forward to aft of the vessel just above the blocks.

Q. That is the steering rod?

A. Yes.

Q. I will mark that, steering rod?

A. Yes.

Q. Is that steering rod on both sides of the ship?

A. Yes.

Q. Is this it on the other side of the ship (indicating)?

A. Yes.

Q. I will mark that, steering rod?

A. Yes.

Q. What are these crooked shaped pieces in the picture here, standing vertically?

A. That is the supporter or stanchion.

Q. Supporting what?

A. Stanchion supporting steering rod.

Q. I will mark it, stanchion supporting steering rod?

A. Yes, sir.

(Deposition of Y. Yamamoto.)

Q. How many stanchions are there to support the steering rod on each side?

A. I do not remember the exact number, but I think about eight or nine on one side; the other side the same.

Q. Is this another stanchion supporting steering rod (indicating)?

A. This is a supporter of the steering rod; this is a stay to stiffen the stanchion (indicating).

Q. I will mark this "S. S. S. R."

A. Yes, sir.

Q. Is this another stanchion rod supporting steering gear here (indicating)?

A. That is a roller.

Q. That is another rod?

A. This is a stanchion supporting the other stay, and one more here (indicating). There are three stays to support the stanchion; in some cases only two.

Q. This one shows a stay supporting a stanchion here. I will mark that stay supporting stanchion?

A. Yes, sir.

Q. And what is this?

A. That is a supporter; the same; that is stanchion supporting steering rod.

Q. What is this running up here (indicating)?

A. That is all the same.

Q. And what is this (indicating)?

(Deposition of Y. Yamamoto.)

A. That is the main part of supporter of steering rod.

Q. I will mark that, main part of supporter of steering rod?

A. Yes; and this is the stay to the stanchion here (indicating).

Q. I will mark that, stay to stanchion?

A. Yes, sir.

Q. That is the stay to stanchion supporting steering rod?

A. Yes. And this is supporter of steering rod. Some come down to the deck and some stop at the rail, not so strong; some lead to the deck, which are very strong.

Q. Of what material is the stanchion supporting steering rod made?

A. Steel.

Q. What is the size?

A. The diameter is about two and a half inch.

Q. The supporters to steering rod are about two and a half inches in diameter?

A. Just about.

Q. What is the size of the steering rod?

A. Just about the same.

Q. At the end of the stanchion is what?

A. A roller, to make it easy to move.

Q. So that it can roll back and forth?

A. Yes, sir.

Q. That is the same with all stanchions,—a roller on top of each?

(Deposition of Y. Yamamoto.)

A. Yes.

Q. This steering rod goes from where to where?

A. From the engine room,—from here to after deck.

Q. And what does it connect?

A. The chain.

Q. And what does the chain connect?

A. From the main part of steering engine.

Q. And from the main part of steering engine to what, at the after end?

A. To the buffer of the steering tackle, by means of a shackle.

Q. What is the buffer connected with?

A. With another chain.

Q. And what is the other chain connected with?

A. To the rudder quadrant.

Q. And what is the rudder quadrant connected with?

A. With a shackle.

Q. To what?

A. To the end of the rudder quadrant.

Q. Then this steering rod connects the rudder with the steering engine?

A. Yes, sir.

Q. Where is the steering engine located?

A. In the engine room,—on top of the engine room.

Q. From what place do you control the steering engine?

A. On my flying bridge.

(Deposition of Y. Yamamoto.)

Q. With what?

A. With controlling rods.

Q. That is connected with what?

A. That is connected to the steering wheel.

Q. On the flying bridge?

A. Yes.

Q. Have you a pilot house?

A. No.

Q. A steering house?

A. We have no steering house. The steering wheel is on the flying bridge.

Q. The helmsman is always exposed out of doors?

A. Yes.

Q. On the after deck your lumber only was loaded to the top of the bulwark rail?

A. Yes, sir.

Q. Why?

A. To preserve the steering rod safety; that is a very important thing for my steamer, and to protect the steering rod I do not take it above the rail.

Q. Now, give the reasons, how taking lumber above the bulwark rail might affect the steering rod?

A. If I take a high deck load, when she meets bad weather and the ship makes heavy pitching in Indian Sea, if I have such a load, the lumber must be loosed by the ship's violent laboring; if the lumber is loosed a little, the strain is increased on

(Deposition of Y. Yamamoto.)

the chain, so that it is very dangerous, and I am afraid to carry it above the lashing rope; and of course if it is broken it is very dangerous, but if it is not broken and only loosened a little, the lumber must come to one side; then the whole body of lumber pushes my steering rod supporters and the steering rod, and that is very very dangerous; it may be bend or be broken, that is the steering rod; if it is bent or broken, I could not steer at all; and that is very, very dangerous for steamers in rough sea.

Q. What is the distance from the edge of the load to the supporter of your steering rod?

A. About two inches, from the big stay to the lumber pillars.

Q. (Mr. Wood) Two inches from which side of the lumber stanchion?

A. The outside of the lumber stanchion to this supporter,—about two inches; a very small space.

Q. What is this, where my pencil is?

A. That is a pillar stanchion, for the lumber.

Q. I will mark that, pillar stanchion for lumber.

A. Yes.

Q. These others of the same appearance are pillar stanchions for lumber also?

A. Yes, sir.

Q. What was the size of the pillar stanchions?

A. I could not say exactly, but I think about ten by eight inches.

Q. Look at this point (indicating). What is

(Deposition of Y. Yamamoto.)

this little mark above the pillar stanchion for the lumber, running horizontally?

A. That is the main part of the supporter.

Q. (By Mr. Wood) The steering rod stanchions are the goose-neck or crooked ones?

A. Yes, they are not straight.

Q. I have marked here, main part of supporter.

A. Yes.

Q. That supporter is a supporter for the steering rod?

A. Yes.

Q. The same as the steering gear stanchion?

A. All the same; some come down to the deck and some do not.

Q. What is the effect of your bulwark rails to hold your lumber when only loaded to the bulwark rails?

A. My bulwark is strong enough for this lumber cargo.

Q. Strong enough to hold it?

A. Yes.

Q. If you load the lumber above the bulwark rail, the heavy rolling and pitching will spread it out?

A. Yes.

Q. And maybe it will come loose?

A. Yes, and push my steering rod stanchion.

Q. If the lumber gets loose and spreads out and damages the steering rod in a storm, then what happens?

(Deposition of Y. Yamamoto.)

A. I cannot steer at all by the steering engine, or the steering gear.

Q. Have you any other steering gear than the steam steering gear on the ship?

A. Besides the steam steering gear I have hand gear.

Q. And where is that located?

A. On the after part of the poop deck.

Q. Now your hand gear,—suppose the steam steering gear gives way in a big storm, how about using the hand steering gear?

A. In such a case if my steam steering gear is broken and I cannot use it, I must disconnect the steam steering gear from the steering quadrant, and after that I must connect it to the hand gears, and then I steer by the hand gear.

Q. Now, in calm weather, how would you disconnect the steam steering gear and connect the hand steering gear?

A. I can make a diagram.

Q. Yes, you may draw it.

A. This is my steering rod, and this is the buffer (indicating).

Q. And what is this?

A. That is the chain. (Marking.)

Q. What is this?

A. This is the roller (marked accordingly.)

Q. And what is this?

A. That is the chain from the end of the quadrant.

(Deposition of Y. Yamamoto.)

Q. And what is this in here?

A. That is the quadrant.

Q. And what is this?

A. Rudder trunk. (Marked accordingly.)

Q. Now, the way this drawing is made it represents your steam gear connected?

A. Yes.

Q. The chain running from the port side connects with the starboard end of the quadrant?

A. Yes.

Q. And the chain from the starboard side connects with the port end of the quadrant?

A. Yes.

Q. The ends of quadrants are marked Q-A?

A. Yes. If the steering rod is bent or broken about here at point "X," I disconnect the shackle here first.

Q. At point Q-A?

A. Yes. After that the quadrant is clear from the chains and then I connect the hand gearpin.

Q. I will have that diagram marked for illustration purposes Claimant's Exhibit 7, Yamamoto.
(Diagram marked accordingly.)

The Witness: The diagram in this book I have here, shows the same system.

Q. Now please draw a picture showing the hand steering gear?

A. I can use this diagram, which I can tear out of the book.

Q. Very well.

(Deposition of Y. Yamamoto.)

Mr. Hayden: We will ask to have it marked Claimant's Exhibit 8, Yamamoto.

Q. And also this page here?

(Page marked Claimant's Exhibit 9, Yamamoto.)

Q. Referring to this picture, No. 8, does it show substantially the arrangement of the hand steering gear on the "Saigon Maru"?

A. Yes, just the same.

Q. Referring to picture, Identification No. 9, figure 1, is that the same as the "Saigon Maru"?

A. Yes, sir.

Q. What do you do to connect the hand steering gear when the steam steering gear gets out of order?

A. We must connect the hand gears. The chain is unshackled and we make the quadrant clear from the chain.

Q. I will mark on Exhibit 8 what you call the quadrant?

A. Yes, sir.

Q. And this connects with the rudder at the bottom here (indicating)?

A. Yes, sir.

Q. I will mark that?

A. Yes. This shows it already connected, that is No. 8.

Q. That shows the hand steering gear already connected?

A. Yes, the coupling rod is No. 7 on the sketch.

(Deposition of Y. Yamamoto.)

That rod is resting outside here when it is not in use.

Q. That place where it is not connected when you are using the steam gear is marked "coupling pin?"

A. Yes; then we bring the coupling rod over here and put in this pin. It is not so difficult a job in smooth water, and takes ten or fifteen minutes,—in smooth water.

Q. Now, referring to the drawing No. 9, what is this rod here (indicating)?

A. That is the coupling rod.

Q. I will mark this coupling rod?

A. Yes.

Q. And this is the same here?

A. Yes,—on the port side.

Q. This picture shows it connected now?

A. Yes.

Q. When disconnected how is it arranged?

A. The coupling rod is turned out to one side. You take out the pin here (indicating).

Q. And this shows the coupling disconnected?

A. Yes. That moves all the time, and we put oil on that all along.

Q. I will mark this, coupling rod disconnection?

A. Yes.

Q. Here is a pin hole,—see where I mark it?

A. Yes, sir. This pin is always in the lock when it is not wanted, and this rests on some supporter, and that is oiled all the time.

(Deposition of Y. Yamamoto.)

Q. The pins through the connecting rods, when not in use, rest in the slot and move back and forth in the rudder gear, and it is oiled all the time when they are using the steam gear?

A. Yes.

Q. And when you want to connect again, you swing the disconnected rod over and attach to the end of the steering gear as shown in the drawing?

A. Yes.

Mr. Hayden: We introduce these sketches 8 and 9 as illustrative.

(Sketches already marked Claimant's Exhibits 8 and 9 respectively, Yamamoto.)

Q. Now, you said something about difficulty in connecting the hand steering gear if the steam steering gear were broken in a big storm?

A. Yes.

Q. Explain that more fully.

(Whereupon at 12:50 M., an adjournment was taken to 2:00 P. M.)

Two P. M., February 12, 1918.

DEPOSITION OF YAMAMOTO—Resumed.

(By Mr. Hayden):

Q. Please explain the difficulties in connecting the hand steering gear should your steam steering gear break in a storm?

A. In such case the strong wind is all the time at the steamer's deck and she runs heavy and laboring very much, rolling and pitching, and we can-

(Deposition of Y. Yamamoto.)

not steer without the steering gear. In such case even though we take care about it, it is very difficult to send a man aft to connect that up; I send a man aft to make the connecting, but it is difficult work; it is almost impossible to work the gears.

Q. Why?

A. Because of the heavy sea running and attacking the steamer's deck and laboring very heavy.

Q. What happens to the rudder?

A. And also the rudder is moving violently,—swinging violently by the sea hitting the rudder surface, so that it is very difficult, I would say impossible in such case, and if I can attach the connecting rope, suppose I may, to put a man to the wheel to steer is very dangerous, the ship laboring very heavy and rolling and pitching, and the big sea attacking the deck; so that people cannot stand along side the wheel—may go overboard, wash overboard, so that I cannot make this work under bad weather.

Q. Now, Captain, you have mentioned one reason why you did not put more cargo on the aft deck, that is, because of the danger of destroying the steering rods; now, was there any other reason in your mind why you did not take more cargo on deck; or on the after deck either (question interpreted)?

A. I cannot take more lumber, because if I take more lumber than the quantity I had it would make

(Deposition of Y. Yamamoto.)

the stability low; that is dangerous to steamers in navigation.

Q. But how do you account for the taking of more deck cargo making your stability low?

A. The "Saigon Maru," when she runs between Bombay and Japan with full cargo in the hold only, I always feel a little tender; the ship is tender; that is a special character of the "Saigon Maru; I feel that in my experience.

Q. How does that tenderness show itself?

A. When the sea comes from our beams side, the ship rolling heavy, and cannot come back so quick.

Q. It rolls slow?

A. It rolls slow and very heavy. And another reason, when I take the helm hard over to starboard I feel the ship lists more; that means that she is tender; tender structure.

Q. Without deck cargo?

A. Yes. In such times the stability is not so bad, during my Bombay run; I feel her tender; the stability is not so good.

Q. What kind of cargoes are you carrying when it shows that kind of tenderness?

A. From Bombay to Japan, I carry cotton only.

Q. Is that ship tender with cotton cargo?

A. Generally I feel she is tender.

Q. Is cotton cargo a heavy or light cargo?

A. I think cotton is one cubic foot to thirty pounds, and lumber is about thirty-five or thirty-

(Deposition of Y. Yamamoto.)

six pounds; so that lumber is a little heavier than cotton.

Q. You say you find your ship feels tender when you are carrying cotton cargoes; why did you mention that in connection with the question about your lumber cargo from Portland?

A. It is to compare the stability when I load lumber at Portland with my usual experience. It must be a homogeneous cargo. To Bombay I take all kind of cargo, and the weight is different, but Bombay cotton is nearly the same, a little lighter than the lumber, and homogeneous; so that I compare them.

Q. Have you any water ballast tanks on your ship?

A. Yes.

Q. Have you any fresh water tanks on your ship?

A. Yes, sir.

Q. How many water tanks, fresh and salt, have you on your ship?

A. The "Saigon Maru" has five ballast tanks and one after tank,—fresh water tank, like this (illustrating with drawing).

Q. Now, which ones do you carry fresh water in?

A. When I leave Portland I put fresh water in here and here, and the small tank about eighteen tons; and I put my fresh water here and here and here (indicating).

(Deposition of Y. Yamamoto.)

Q. Can you tell by looking at your log which is fresh water?

A. Yes.

Q. You may look at the log.

A. Yes, that is right (making sketch).

Mr. Hayden: We will have the sketch marked Claimant's Exhibit 10, Yamamoto.

(Sketch marked accordingly.)

Q. Referring to this Exhibit No. 10, you took fresh water in the tanks marked "F"?

A. Yes, sir.

Q. That is in No. 1, No. 3 and No. 5; the aft peak and your little tank marked "F.W."?

A. Yes.

Q. How many tons does each of these tanks hold of water; that is tons capacity?

A. No. 1, 126 tons; No. 2, 229; No. 3, 181; No. 4, 206; No. 5, 96; and this one 45.

Q. That is aft peak?

A. Yes. And this, 18 tons.

Q. That is the little one?

A. Yes. The fore peak is not used for water.

Q. The after peak is marked "A.P." and fore peak "F.P."?

A. Yes.

Q. What is your daily water consumption?

A. My daily water consumption is about 12 tons.

Q. Where is that water taken from?

A. 6½ tons, the drinking water, is taken from the after peak and from this small tank that is the

(Deposition of Y. Yamamoto.)

galley use, the people use; and the engine and machinery take from No. 3.

Q. What is the effect on the stability, of using the water from these tanks?

A. If I use the ballast tank water it makes our center of gravity more high and makes the stability bad.

Q. What is the construction of your tanks inside?

A. My steamer has no longitudinal section in the ballast tank.

Q. When you use the water out of the tank under those circumstances, what is the effect on the ship when she is in a seaway?

A. As my steamer tank has no longitudinal section and I use the ballast tank water, when it is at half tank the ship heels to some side by the wind and sea, and the water goes to that lee side, and that increases the ship's heeling.

Q. And how does that affect the stability of the ship?

A. That also makes the center of gravity higher than before.

Q. And the water going to one side when she heels over, affects her how?

A. It makes her more tender.

Q. And when she gets over that way on one side, how does it affect her righting?

A. It makes it very slow.

Q. The water always goes to the low side?

(Deposition of Y. Yamamoto.)

A. The lee side.

Q. Now, where are her coal bunkers?

A. I will illustrate that and give my best opinion (making sketch). I do not know exactly. This shows the hold bunkers, and this is the 'tween-deck bunkers, and this is deck bunker; and this shows the main deck here, with the different decks.

Q. The bunker marked "A" is the hold bunker?

A. Yes.

Q. The one marked "B" is the 'tween-deck bunker?

A. Yes, sir.

Q. The bunker marked "C" is the deck bunker?

A. Yes.

Q. The small diagram at the bottom is marked "C"; that is the deck bunker?

A. Yes.

Q. And "B" the 'tween-deck bunker?

A. Yes.

Q. And "A", the hold bunker?

A. Yes, that is right; that is only a rough sketch.

Mr. Hayden: We will introduce the sketch and have it marked. (Sketch marked as Claimant's Exhibit No. 11, Yamamoto).

Q. Can you show the location of the coal bunkers on your sketch marked No. 10?

A. The engine room space is about above No. 8; anyhow amidships.

(Deposition of Y. Yamamoto.)

Q. Now, mark off the decks on your sketch No. 10, and the hold?

A. This is the hold here.

Q. And the 'tween decks?

A. Here.

Q. Does the 'tween deck run all the way fore and aft?

A. Yes.

Q. And this is the main deck here?

A. Yes, sir.

Q. Mark that main deck?

A. Yes.

Q. And this the 'tween deck?

A. Yes, sir.

Q. I will mark that.

A. Yes.

Q. Now where is the hold bunker, shown on No. 10?

A. That would be about here (indicating). This would be the cross bunker.

Q. Does the cross bunker run all the way across the ship?

A. Yes, from side to side.

Q. We will mark that cross bunker on No. 11. (Marked "C. B.")

Q. And what are these marks?

A. That is the boilers; we have three boilers (marking).

Q. And what are these?

(Deposition of Y. Yamamoto.)

A. This is forward of the boiler room, and over here is the engine room.

Q. This is looking down on it?

A. Yes.

Q. Referring to diagram "A" on No. 11, that is looking down on the engine room, boiler room and cross bunker?

A. Yes, sir.

Q. Is the cross bunker fore or aft of the boiler room?

A. Forward.

Q. You marked "A" for aft and "F" for fore on No. 11?

A. Yes, sir.

Q. Now, where is the 'tween deck bunkers on No. 10?

A. About here (indicating); just about on top of the engine boiler room.

Q. We will mark that 'tween deck bunkers on No. 11?

A. Yes, sir.

Q. Now where is the deck bunker?

A. That is here, (indicating).

Q. On each side of the ship?

A. Yes, and some across.

Q. We will mark that deck bunker?

A. Yes, sir.

Q. Now, when you used your coal on your voyage, where did you take it from first?

(Deposition of Y. Yamamoto.)

A. When I begin my voyage I must burn out some quantity of the hold bunkers coal first.

Q. Explain why? (Interpreted).

A. The hold bunker is located near the boiler and it heats up the coal, and it happens that there is danger to start a fire.

Q. Now, Captain, you may explain it in your own way, why you used the coal from the cross bunkers first?

A. I must use the hold bunkers first.

Q. Now, try in English to explain.

A. But I can't do that.

Q. Well, you may try.

A. The same as he stated; my steamer construction of the hold bunker puts it very near the boiler room and engine room and always feel the heat from the boilers, and I fear to start a fire in the coal. So that I order the chief engineer to burn out the bottom part first to prevent fire—for some quantity of coal.

Q. What effect has that on the stability of the ship?

A. It makes the stability bad.

Q. How many tons of coal did you take for your bunkers on the trip from here to Nagasaki, altogether?

A. I took coal 1200 tons at Portland for my engines.

Q. Did you go from Nagasaki to Bombay on one coaling?

(Deposition of Y. Yamamoto.)

A. Yes.

Q. How much did you take at Nagasaki?

A. I took coal at Nagasaki about 1050 tons.

Q. How much coal in the deck bunker?

A. Maybe about 500 tons.

Q. And how much 'tween deck bunkers?

A. About 200.

Q. And how much in the hold cross bunker?

A. Altogether about 500. Well, I think the deck bunker was somewhat more than 500 tons.

Q. How much did you have in at Nagasaki when you got through coaling and left there?

A. About 1300.

Q. You coaled once after you left Portland until you got to Bombay?

A. No, I coaled at Singapore again.

Q. So that you coaled at Portland, Nagasaki and at Singapore?

A. Not at Portland; I took coal at Tacoma.

Q. And then went to Portland?

A. Yes, sir.

Q. How much coal did you have in at Tacoma when you left here for Portland?

A. About 1300 tons, roughly.

Q. And how much coal did you burn a day in running at sea?

A. About 30 tons.

Q. How much coal did you burn from Tacoma to Portland and while in Portland before you went to sea?

(Deposition of Y. Yamamoto.)

A. From Tacoma to Portland I burned about 50 tons I think, and during the time at Portland about 30 tons, so that it would be altogether about 80 or 90 tons.

Q. Your stability on your voyage becomes less—why?

A. Because I must burn my bottom coal first to prevent burning.

Q. You mean to prevent spontaneous combustion?

A. Yes, sir. And I must decrease the water day by day, so that the weight in the bottom is decreased, which means that the center of gravity comes higher, which makes the stability worse.

Q. Also, what happens to the deck cargo on the voyage, to affect the stability; does it become wet?

A. Yes, the deck cargo in the heavy seas on the voyage and the weight of it must be increased; and the ballast tanks become half.

Q. In other words, the bottom of the ship gets lighter and the deck gets heavier?

A. Yes, that is it.

Q. With your experience in the China Sea and in the Indian Ocean, a voyage through those seas in July and August, and your knowledge of the "Sai-gon Maru", what do you think was a reasonably safe cargo to carry on deck, of lumber, and with the hold full of lumber?

A. I think about 300 or 330 tons; something more than 300 tons on deck.

(Deposition of Y. Yamamoto.)

Q. Was there a survey of the ship made at Nagasaki?

A. Yes, sir.

Q. Do you remember when it was made at Nagasaki?

A. On the 3rd of July.

Q. How did the lumber on the ship compare at Nagasaki with the lumber on the ship when she left Portland on this voyage—at the time of the survey?

A. Just the same.

Q. As to the coal, at the time the survey was made—(interrupted)

A. The examination.

Q. How did your coal compare with the coal at Portland?

A. The same.

Q. How did your water compare with the water at Portland?

A. The water was a little different.

Q. How was it.

A. About 150 tons less at Portland than at Nagasaki.

Q. Was there any difference in the ship between Portland and Nagasaki?

A. No, sir.

Q. Who made the survey at Nagasaki?

A. Kawahara and Saika.

Q. What was their business?

A. Ship building architects, we might say.

(Deposition of Y. Yamamoto.)

Q. Who were Kawahara and Saika working for regularly?

A. Mitsui Bishi, Nagasaki Ship Building Yard.

Q. Did those two men make the examination together?

A. Yes, sir.

Q. What kind of a ship yard was that; big or little?

A. The biggest ship yard in Japan.

Q. They are the marine architects for that ship yard, are they?

A. Yes, sir.

Q. (By Mr. Wood) How many board measure feet of lumber make a ton?

A. 480 feet.

Q. Is there anything further about this case which you have not stated? What was your freight on your lumber on this voyage per thousand board feet?

A. I do not remember now (consulting memoranda); I see by this that it is 240 shillings; that is according to the charter.

Q. (By Mr. Wood) I think you should put in the charter to show it.

Q. Your pay to the owners depended on the number of thousand feet of lumber you carried, did it?

A. Yes, I believe so.

Q. When you were at Portland and the Pacific Export Lumber Company were asking you to take

(Deposition of Y. Yamamoto.)

more lumber, you knew your owners would lose money in freight if you did not take it, did you?

A. Yes.

Q. With regard to the construction and equipment of the ship, was that the same from the time you left Portland until you got to Bombay on this voyage?

A. Well, of course the construction would be the same.

Q. Was the construction the same and her equipment the same from the 19th of March, 1917, until she finished her voyage at Bombay—that is, had there been any change in her construction and equipment?

A. There was no difference.

Q. Did the Pacific Export Lumber Company in June before you left and while there was a dispute about the amount of lumber you would take on deck, tell you that your owners would lose some \$27,000 in the way of freight if you did not take all the lumber they claimed you should?

A. Yes.

Q. Do you know the practice among sea captains about carrying deck cargo into the United Kingdom of Great Britain and Ireland during the winter time?

A. Yes.

Q. What is it?

A. The English Government—(interrupted)

(Deposition of Y. Yamamoto.)

Mr. Wood: If it is any regulation of the English Government, that would be the best evidence.

Q. Do you know whether the Osaka Shosen Kaisha is incorporated, and if so, of what country?

A. Yes, it is a corporation of Japan.

Q. That company is a corporation existing under the laws of Japan?

A. Yes.

Q. That company is engaged in the business of transporting goods by water, by steamers?

A. Yes, sir.

Q. And was at the time of this voyage a charter party?

A. Yes, sir.

Q. How many ships has the Osaka Shosen Kaisha?

A. About 140 altogether.

Q. And what kind of ships are they, as to size?

A. About 1500 gross tons, about 80; and the others smaller; the big ones, about 20; above 600 tons gross; and the biggest one has a gross tonnage of 9000. My company has at present two big steamers, above 9000 tons.

Q. Are any of the Osaka vessels engaged locally in Oregon, plying back and forth?

A. No.

Q. The "Saigon Maru" is the only steamer of its line which went into Oregon at the time of this charter party and since?

(Deposition of Y. Yamamoto.)

A. It is the only one which loaded lumber at Portland at any time.

Mr. Wood: It seems to me this is not within his personal knowledge.

Q. In your opinion would it have been safe to take more deck cargo on this voyage?

A. No, sir.

Q. In your experience as a seaman, do you know what is a reasonable G. M. for a vessel; I mean for a steamer carrying cargo like your steamer?

A. Yes, sir.

Q. What is it?

A. The common steamers must have G. M. from one foot to two feet.

CROSS EXAMINATION.

(By Mr. Wood) :

Q. What do you mean by G. M.?

A. G. M. is the distance between the center of gravity and the metacenter.

Q. Now, this is the letter which you got from the Pacific Export Lumber Company?

Mr. Hayden: We object to that letter on the ground that it is immaterial and incompetent so far as any question in this case is concerned, and contains a number of self-serving statements, and is not proper cross examination.

A. Yes, sir.

Q. That is the letter in which they gave you notice of this \$27,000 loss of freight to your owners?

(Deposition of Y. Yamamoto.)

A. Yes, sir.

Mr. Wood: We offer that in evidence.

Mr. Hayden: Same objection, incompetent and immaterial and not proper cross examination.

(Said letter marked as Libelant's Exhibit Yamamoto "A.")

Q. You spoke at one time of your estimate of the velocity of the wind being six or seven?

A. Yes, sir.

Q. I think you were speaking of typhoons at that time?

A. (Interpreted) Six to seven means the measurement of the power of the wind. (Direct) As shown by the wind scale; six or seven, means a strong breeze, or moderate gale.

Q. These numbers are the system adopted by sea captains to indicate the strength of the wind and are as indicated on the list marked on the scale on page 11, in Roman numbers in your log?

A. That is the mark which indicates the scale of the strength of the wind.

Q. This scale on page 11 of the log is the scale we are talking about?

A. Yes.

Q. In Nagasaki where you had this survey made, you have ten o'clock "Executing inclining experiment of the ship by the Mitsubishi engineer."

A. Yes.

Q. Tell us what that inclining experiment is?

A. To find out our G. M. height.

(Deposition of Y. Yamamoto.)

Q. What did you find as shown by that experiment?

A. G. M. height 1.36 feet.

Q. Is it shown here on the log?

A. Yes, it must be. (Examines page) No, it is not mentioned.

Q. The G. M. is not shown here?

A. It is not.

Q. Have you got it anywhere?

A. I have it in the other papers.

Q. The G. M. as shown by this experiment?

A. Yes, sir.

Q. What was it?

A. 1.36 feet.

Mr. Wood: I offer the log.

(Log marked as Libellant's Exhibit B.—Yamamoto.)

Q. You say you made one other voyage in the "Saigon Maru" from America to Japan besides this?

A. No; only that one voyage.

Q. Or voyage from Portland to Bombay; that was the only voyage which you made in the "Saigon Maru" from America to the Orient?

A. Yes.

Q. And before that time you had made one other voyage from America to the Orient in another ship?

A. Yes, sir.

Q. What other ship was that?

A. The steamship Panama Maru in the regular service.

(Deposition of Y. Yamamoto.)

Q. Were you master on her?

A. Yes.

Q. Belonging to the same company?

A. Yes.

Q. A sister ship?

A. No. The Canada Maru and Panama Maru were sister ships.

Q. Where was the voyage made from in the Panama Maru?

A. From Kobe to Tacoma.

Q. Was that for a lumber cargo?

A. No.

Q. What did you take from Tacoma out?

A. Many kinds of general cargo.

Q. But no lumber?

A. No.

A. Then this lumber cargo on the "Saigon" is the only lumber cargo which you have carried from America over?

A. Yes.

Q. Have you ever carried other lumber cargoes in any other place in the world?

A. No.

Q. What are the dimensions of the "Saigon"—gross tonnage?

A. 4,254.

Q. And have you the net?

A. 2,740.

Q. And her dead weight capacity?

A. (Consulting memorandum) To carry cargo

(Deposition of Y. Yamamoto.)

Q. I have it here in the memorandum 6,779 tons; is that about right?

A. Yes, it may be. The displacement is about 5,900 tons.

Q. What is the length?

A. 223 feet, 3 inches.

Q. And her beam?

A. 50 feet and 3 inches to the outside of the plating.

Q. And her depth?

A. From main deck to the bottom, 30 feet 9 inches.

Q. (By Mr. Hayden) That is from the top of the hold?

A. Yes.

Q. Is that the same as sometimes called the depth of hold?

A. It must be different.

Q. What is the depth of hold?

A. 27 feet, depth of hold under the main deck, including the hold and Tween deck.

Q. (By Mr. Hayden) What is the height of your ballast tanks?

A. About 42 inches.

Q. (By Mr. Hayden) Do the ballast tanks go all the way across the ship?

A. Yes.

Q. You said the deck cargoes you carried in the Blue Sea and Indian Ocean consisted in coal tar, sulphuric acid and explosives?

(Deposition of Y. Yamamoto.)

A. Yes, sir.

Q. And you carried them only in the good weather season?

A. Yes.

Q. Are there any other bad weather seasons in those oceans except these you have told about?

A. Yes, in the Indian Ocean except the monsoon season, it is very good generally, and in the China Sea except the typhoon season it is generally good. But in the winter time the strong wind blows in the China Sea, but it is not so dangerous; it is a steady wind.

Q. You made six voyages from Japan to Bombay in the "Saigon Maru"?

A. Yes.

Q. Does that count this voyage which you made for the Pacific Export Lumber Company?

A. Except that voyage.

Q. Then six besides that?

A. Yes.

Q. And you made them all in this one ship?

A. Yes, the "Saigon Maru".

Q. Were some of those before this voyage and some after, or all before?

A. One trip was afterwards.

Q. They were from Japan to Bombay?

A. Yes.

Q. Were some of them made in the stormy seasons?

A. Yes. I met a typhoon in the China Sea when

(Deposition of Y. Yamamoto.)

out in the "Saigon Maru", but not so heavy, and I met with a strong southwest gale.

Q. How many of these voyages were made in the stormy season?

A. I met with a typhoon in the China Sea with the "Saigon Maru" at one time and perhaps twice the strong southwest gale.

Q. In the Indian Ocean?

A. Yes. And also I met with strong northeastern monsoon in the China Sea.

Q. That was in the winter time?

A. Yes; that is so awful strong.

Q. You have not yet told me—perhaps you do not understand how many of these six voyages occurred in the stormy season. Did they all occur in the stormy season?

A. No.

Q. How many of them in the stormy season in these oceans, that is in the "Saigon Maru"?

A. I think four trips in the bad season.

Q. Which was the worst, the monsoon or the typhoon?

A. The typhoon is more terrible than the monsoon.

Q. The typhoon does not come so often as the monsoon, does it?

A. The typhoon is not so often as the southwest monsoon, but if it blows it is very terrible.

Q. In refusing to take more deck load than you

(Deposition of Y. Yamamoto.)

did at this time, did you have in mind the dangers of the China Sea or the Indian Ocean?

A. Yes.

Q. Which one did you fear most?

A. I fear the typhoons more than the southwestern monsoon.

Mr. Wood: If counsel thinks the witness has not understood any of my questions and makes any misstatement, I will be glad if you will call my attention to it.

Mr. Hayden: Possibly we should have the matter of his taking into consideration the typhoon and monsoon gone over again.

A. (Interpreted) I had in mind the fear of both the typhoon and the monsoon when I refused.

Q. And one more than the other?

A. (Interpreted) I had in mind both typhoon and monsoon, and the typhoon is more terrible than the monsoon.

Q. Now, Captain, you spoke of some other routes that ships could take from Nagasaki to Bombay, and I did not understand very clearly just what they were. Do they all lead through the China Sea?

A. From Nagasaki to Bombay they must pass through the China Sea.

Q. They must go through the typhoon area?

A. Yes, sir.

Q. And when you get to Singapore and go from there to Bombay, must you go through the monsoon area?

(Deposition of Y. Yamamoto.)

A. Yes.

Q. So that these other routes do not really make any difference. They all go through these two oceans; is that right?

A. They all must go that route.

Q. Is one of these routes more dangerous than another, through the China Sea?

A. From Nagasaki to Singapore must pass the China Sea.

Q. And if they go this way it is just as dangerous as the other?

A. The same.

Q. One way is not safer than the other?

A. Just the same.

Q. Is one route in the Indian Ocean any safer than the other?

A. All the same.

Q. Not much choice?

A. No.

Q. Is there anything about a typhoon that makes it different from other bad storms?

A. Yes.

Q. What is it?

A. A typhoon is a cyclone.

Q. Aren't all storms cyclones?

A. The most terrible storm, the typhoon—if a steamer enter the center of a typhoon, it has a big terrible sea, sharp sea, and attack from all around. Other big storms come from one direction only, but the typhoon come from all directions, if the ship

(Deposition of Y. Yamamoto.)

near the center. That is the difference from other winds; and it is very dangerous.

Q. Have you ever been in the center of one?

A. No.

Q. All storms are cyclones in that they are circular, aren't they?

A. No, I don't think so. Only cyclones.

Q. Typhoon is a Chinese word for this kind of a storm?

A. It is one kind of a cyclone. The Chinese call it typhoon. The Indians call it hurricane. Cyclone and typhoon are the same only different in the name.

Q. Are the centers of those typhoons so bad that the ship is generally wrecked in them, or does she generally come through?

A. If steamers enter near the center or in the center, mostly the steamer goes down; so that the center of the typhoon is very very dangerous for a steamer; we must avoid it.

Q. Now the monsoon is a very different kind of a storm?

A. Yes.

Q. It comes from one direction?

A. Yes.

Q. The wind is not so great but the swell is heavy; is that it?

A. The southwest monsoon, yes.

Q. And the swell strikes you on your port quarter?

(Deposition of Y. Yamamoto.)

A. Port beam.

Q. All the sea swells are made by the wind, aren't they; that is, the wind causes the swell at sea?

A. Yes, sir.

Q. Why is it that the swell caused by this monsoon is larger in proportion than swells caused by other like winds?

(Question and answer interpreted.)

A. In case of a monsoon, the powerful and stormy wind continues to blow by which the sea swells grow bigger.

Q. Then it is the fact that the wind blows continuously that makes the larger swell?

A. Yes, sir.

Q. (By Mr. Hayden) And continuously from the same direction.

A. Yes. A long time; and this Indian Ocean monsoon is always accompanied by rain, heavy rain.

Q. That is, when there is a heavy monsoon.

A. (Interpreted) Through the monsoon season the raining is continuous throughout the season.

Q. When you speak of typhoons in the China Sea occurring three or four times a month, do you mean such bad typhoons as you have described here, that would wreck a ship when it gets in the center?

A. No, such big typhoons do not blow so often.

Q. Those terrible bad typhoons which you have described are pretty rare, aren't they? (Interpreted.)

A. Yes, sir.

Q. Suppose you get into a storm and your deck

(Deposition of Y. Yamamoto.)

load loosens as you are afraid it might and the lashings break, your deck load goes overboard, does it?

A. Yes, sir.

Q. The ship rolls and dumps her deck load; is that right?

A. (Interpreted) You mean in the southwest monsoon?

Q. I mean in any storm? (Interpreted).

A. When the steamer meets a strong storm in her voyage with a big deck load 14 feet high, on the "Saigon Maru", the lumber must be loosened by the ship's rolling and by-and-by in two or three days in such weather the lumber may be spread out, and all the time pushing against the wooden pillars like this (illustrating).

Q. The worst that could would be that it would go overboard, wouldn't it?

A. The worst is to hurt the stability of the vessel.

Q. That is, you are afraid the cargo would shift?

Mr. Hayden: I think possibly he did not understand that other question.

Q. What would be the worst thing that could happen if the cargo became loose. I will ask the question again. You say you are afraid that with a deck load, say 14 feet high on the "Saigon Maru", if you got in a storm and it lasted three or four days, the load would loosen?

A. Yes.

(Deposition of Y. Yamamoto.)

Q. Now, then, what were you afraid of if it loosened?

A. I am afraid by that loosening of the lumber it would bend our steering rod or carry away the steering rod.

Q. Bend or carry away the steering rod?

A. Yes, that is it.

Q. Were you afraid of anything else except for the steering rod? (Interpreted).

A. By and by after a long time it would carry away the lashings, maybe.

Q. The lashings of the deck cargo?

A. Yes, after a time; but the worst I fear is the bending of the steering rod.

Q. If your deck load lashings did carry away, what would happen? (Interpreted).

A. Then the deck cargo begin to move freely by big sea.

Q. Would it stay on board or go off?

A. When some of the cargo should be washed away, then it might destroy the apparatus of the vessel, the hatch coaming, the house, boats and steering rod.

Q. It would hurt the deck apparatus and fittings?

A. Yes.

Q. If you had had another kind of steering gear, would you have taken more deck cargo? (Interpreted).

A. No; it would affect the stability.

(Deposition of Y. Yamamoto.)

Q. Why not?

A. If I have a strong kind of steering gear—(Interrupted).

Q. A different type?

A. If I had another steam steering gear I could not take more than 323 tons on deck.

Q. Why not?

A. Because my stability would not permit more.

Q. Has the "Saigon" ever taken more than 323 tons on deck?

A. No.

Q. Has she ever carried any lumber cargoes?

A. But very few; small quantities.

Q. This is the only full cargo of lumber—or lumber cargo alone, that she ever carried?

A. Yes, sir.

Q. We do not admit that this is a full lumber cargo. The "Saigon Maru" you think then is not able to carry the same sized cargoes as other ships of her size engaged in this Trans-Pacific trade? (Interpreted).

Mr. Hayden: You should include going through the China Sea.

Mr. Wood: I think he is speaking of stability generally.

A. I do not know about other steamers, but the "Saigon Maru" cannot take so much weight on deck. 323 tons is as much as she can take for her stability.

Q. At other seasons of the year if she were not

(Deposition of Y. Yamamoto.)

going through the monsoon season or the typhoon season, how much would you have taken?

A. You mean on the Pacific Ocean or Indian Sea?

Q. Is there a time of the year when you can go from this coast to Bombay and not meet typhoons and monsoons?

A. I don't think so; let me see—yes. In passing China or the Indian Sea from November, December, the winter season, it is comparatively safe.

Q. How much deck load of lumber can the "Saigon Maru" carry in such case?

A. I would not take more than 323 tons; that is the maximum deck load for my steamer for my stability.

Q. For any season?

A. For any season.

Q. For any voyage?

A. Yes.

Q. So that you took as much as you could for any voyage at any time of the year?

A. Yes.

Q. 323 tons?

A. Yes.

Q. That is what you took this time?

A. That is the maximum weight on deck for my proper stability.

Q. And that is what you took on this voyage?

A. Yes.

Q. How does the Canada Maru compare with

(Deposition of Y. Yamamoto.)

the "Saigon Maru" in size and dimensions; is she somewhat the same?

A. No, quite a difference.

Q. The Canada is larger?

A. Yes.

Q. Is she carrying lumber?

A. No.

Q. Have you ever carried lumber on her?

A. This is my first trip on the Canada.

Q. You don't know then how much lumber she will carry?

A. No, I must figure it out.

Q. The "Saigon" you say is tenderer than most ships?

A. I do not know that but I feel that she is more tender. I feel it in my head from my years of navigation experience.

Q. You feel that she is tenderer?

A. Yes.

Q. And do you say as a fact that she is tenderer, or that that is just what you think?

A. I feel the tenderness of the "Saigon Maru" from my long time experience, and also I find out from the G. M. height by the examination and experiment at Nagasaki. That experiment averaged up with my feeling.

Q. (By Mr. Huffer) What do you mean by feeling that she is tender?

A. In my navigation of that steamer she is ten-

(Deposition of Y. Yamamoto.)

der and when a wind comes from the one side she is not so quick to come back. I feel it from that.

Q. (By Mr. Huffer) What do you mean by the word "feel"?

A. (Interpreted) It is a fact which I assume by my experience; that is what I mean by feel.

Q. That is your experience leads you to believe that the "Saigon Maru" is tenderer than other ships? (Interpreted).

A. Yes.

Q. And she is tenderer than other ships?

A. Yes.

Q. When you speak of the deck being flooded, and that increasing the weight of the deck cargo, you mean that the lumber soaks up the water, do you? (Interpreted).

A. Yes, sir.

Q. Is the construction of your ballast tanks and coal bunkers different in the "Saigon Maru" than in other ships?

A. The ballast tank is different than in some other steamers; my ballast tanks have no longitudinal sections. That longitudinal section is a very important thing in a ballast tank. We have no longitudinal sections; it is all open clear through from side to side. I think my coal bunkers are not different from other steamers, although I do not know exactly.

Q. How many of your ballast tanks were filled with fresh water?

(Deposition of Y. Yamamoto.)

A. Three filled with fresh water.

Q. Is that for your use on the voyage?

A. Yes, sir.

Q. You need three tanks full of fresh water?

A. Yes, sir.

Q. Which tank do you use out of from this coast to Nagasaki?

A. No. 1, No. 3 and 5.

Q. Now do you use out of all of them these quantities which you say they contain?

A. I use about twelve tons a day.

Q. And you were about twenty-eight days from Portland to Nagasaki?

A. Yes.

Q. As soon as you empty one tank you can then fill it with salt water, can you?

A. No, sir; we must put fresh water in again. If I take out fresh water at one time and put in salt water, I cannot use it in the engines.

Q. Why not; couldn't you empty the salt water out?

A. No.

Q. Have you got valves and pumps?

A. Not to take out all the water. There is about twenty tons left, that does not come out.

Q. Is that true of all modern ships, that they cannot empty their ballast tanks?

A. Modern ships have longitudinal sections. I do use this tank No. 3 for engine use after my departure. I must use the fresh water. Some days

(Deposition of Y. Yamamoto.)

after leaving Portland this tank was half, and half tank is bad for my stability.

Q. Did you fill that tank at Portland?

A. Yes, sir.

Q. You had all tanks full at Portland?

A. Yes. The small fresh water tank was not full, but it is small and not so low.

Q. Then this ship of yours is not a modern ship?

A. It is not a modern ship.

Q. In modern ships they pump their tanks out entirely?

A. No; even the modern ships could not do that entirely.

Q. When you burn the coal out of your lower bunker, that is the hold bunker, is there any way of transferring coal from the upper bunker to the lower bunker?

A. (Referring to Claimant's Exhibit No. 11) This is the hold bunkers, looking down; capacity about 240 tons, and this is the pocket bunker (marking the letter "P" on the exhibit) and this is the engine room beside the bunker (marking "E. S. B.") The pocket bunkers, capacity 57 each, 115; and E. S. B. 50 or 60; altogether nearly 510 in the hold bunker.

Q. That includes the cross bunker and pocket bunkers and two engine room side bunkers?

A. Yes, sir. After leaving Portland I must burn some quantity in the hold bunker first to prevent combustion. The coal consumption per day, of Am-

(Deposition of Y. Yamamoto.)

erican coal which is not so good, we must use about 32 tons per day. After six days leaving Portland we must use about 200 tons of coal. I take about 20 tons each out of the pocket bunkers and E. S. B. bunkers, and about 100 tons out of the cross bunkers.

Q. That is to prevent danger of fire?

A. Yes.

Q. Then after you have used those 200 tons out of those bunkers which coal do you use next?

A. After that I use the top coal.

Q. But if you want to increase your stability still further, could you move coal from the bunkers C. and B. into A.?

A. After I use about 200 tons, I use the B. and C. coal.

Q. That is not my question; suppose you want to increase your stability, can you take coal out of C. and B. and fill up A. with coal? (Interpreted).

A. Yes.

Q. Captain, you spoke of some of the steering rod stanchions being fastened to the bulwark rail and some going through the bulwark rail down to the deck; is that right; do they go through the bulwark rail down to the deck?

A. Some, but not all. (Interpreted). Some are screwed to the rail.

Q. How close does the deck load of lumber come to the steering rod stanchion?

(Deposition of Y. Yamamoto.)

A. The outside of the wooden pillar, very near the stanchion, about two inches.

Q. Does it come any closer to one kind of stanchion than the other?

A. Both the same from the wooden pier, nearly the same; about two inches.

Q. These upright iron stanchions are all the same distance from the outside of the boat—some are on the rail and some pass through the rail, but they are all the same distance from the outside skin of the vessel?

A. Just the same distance, yes.

Q. Have you ever had to use your hand steering gear?

A. Yes, very often.

Q. In bad weather?

A. No, no, not in bad weather; when the steering engine met with some accident and could not use it, in such case I use the hand gear, in smooth weather, but I do not do that in bad weather.

Q. You never had anything happen to your steam steering gear in bad weather, did you?

A. I don't meet with some accident during bad weather, no.

Q. What is the height of your poop deck compared with the height of your bridge deck?

A. The same; you mean this deck? (Indicating.)

Q. Where your steam steering gear and wheel are?

A. That is the steering wheel here (indicating);

(Deposition of Y. Yamamoto.)

this is my flying bridge—my navigating place. This is the bridge deck here (indicating); the average distance about seven feet. The poop deck is the same height as the bridge deck.

Q. I will mark this wheel on flying bridge, on Exhibit 10?

A. Yes.

Q. And I will mark this bridge deck on same exhibit?

A. Yes.

Q. Is this the wheel you speak of that was not sheltered from the weather?

A. Yes, it is open.

Q. Referring to the flying bridge?

A. That is an open place; it is not housed, a canvas screen only.

Q. How suddenly do these storms arise, these monsoons or typhoons?

A. First, the monsoon, it does not happen so suddenly. It is steady wind, comes along time for four or five months, from June to October, and sometimes not so strong, and sometimes very strong, taking big swell all the time, and rain. The typhoon sometimes happens very quick and sometimes not so quick. There are many kinds of typhoon.

Q. Take the quick kind; how suddenly do they come on you?

A. The typhoons do not happen so quick. When the typhoon rises it is foretold generally about twenty or twenty-four hours before (interpreted).

(Deposition of Y. Yamamoto.)

Q. And the monsoon is always there in that season?

A. In that season, and sometimes very strong.

Q. When the monsoon does blow very strong, does that increase in strength come all at once?

A. It increases gradually; not so suddenly.

Q. Does the sea swell increase with it?

A. Yes, it does.

Q. I believe some of the more modern steamers, Captain, have a steering rod running from the bridge along the deck under a cover, do they not, and then up under the poop?

A. Yes, if I understand.

Q. Instead of along the bulwark rail as the "Saigon" does, it passes along the surface of the deck but covered up?

A. Yes.

Q. And from the deck connected with the quadrant by a chain?

A. Yes, sir.

Q. Are those ships any safer to carry deck loads than yours?

A. Yes. If the steering rod is on deck and guarded with strong iron braces, it is safer.

Q. Is it possible to have your hand steering gear connected up at the same time your steam steering gear is? (Interpreted.)

A. No, no, you cannot.

Q. You said awhile ago that if the deck load got loose it would wreck your deck fittings?

(Deposition of Y. Yamamoto.)

A. Yes.

Q. Wouldn't it wreck your cover over the steering rod going along the deck in the other type of steamer? (Interpreted.)

Mr. Hayden: That is objected to as not material.

A. It would not wreck it by an ordinary storm.

Q. Would any of your deck fittings, the hatch coaming or any of those things be wrecked by the deck cargo getting loose in the ordinary storm?

A. Whenever the deck cargo begins to move freely on the deck, then of course that would wreck the fittings on the deck.

Q. Would that wreck this steering rod running along the deck in those other type of vessel we are talking about?

Mr. Hayden: Objected to as not material; the vessel was chartered as she was.

A. In that other vessel the steering gear or rod is very strong and if the lumber moves, it can steer; the steering gear is not broken by an ordinary storm, so that they can keep the ship's head to the wind and sea.

Q. Then when you testified awhile ago that if your deck load got loose on your ship it would wreck your deck.

A. Yes.

Q. Do you still mean that?

A. But we are talking about the steamer?

Q. Now, I am talking about your steamer—what you said to Mr. Hayden?

(Deposition of Y. Yamamoto.)

A. It may wreck some hatchway, hatch coaming or deck house.

Q. And if the deck load gets loose on one of the other kind of ships that has the steering rod on the deck covered over, why wouldn't it break that cover?

A. The cover is—(interpreted) my opinion is that the steering rod well protected by the steel running along the deck is very strong against such wreckage of the deck cargo, and I believe that it would not break by an ordinary storm. (Direct) I believe so, by ordinary storm.

Q. Would you think it could be wrecked by an ordinary storm?

A. (Interpreted) If the deck cargo began to move then that might wreck the apparatus on deck.

Q. When this deck cargo begins to move, as you say, how long does it take to get loose and work loose?

A. That is according to the power of the sea.

Q. Now, we will say you are in a bad storm and the deck cargo is beginning to worry you a little, how long does it take in a bad storm before you think it would get loose in its lashings?

A. I could not say how long; sometimes it would break quick and sometimes not so quick. There is quite a difference.

Q. Suppose one lashing breaks, the deck cargo still holds, doesn't it?

A. If only one lashing is broken, the deck cargo is spread out but we have many lashings, so that if

(Deposition of Y. Yamamoto.)

only one lashing carries away, in an ordinary case, the lumber don't break.

Q. And it does not spread?

A. It would spread a little but not much. (Interpreted) It would spread but would not carry away or spring up on deck, because the lumber is very long.

Q. If just one lashing carries away, do you say the deck load would spread some?

A. Yes; it would spread some.

Q. You don't know anything about the office management of this company, do you, Captain? (Interpreted).

A. No.

Q. These 140 ships which you have spoken of, do you know whether they are owned by this company or by separate companies controlled by this company? (Interpreted.)

A. All by my company. My company is the second largest company in Japan.

Q. Why did you have this survey made at Nagasaki? (Interpreted.)

A. The vessel had been loaded with deck cargo and the ship is tender and there was fear of a heavy top. (Interpreted.)

Q. That is top-heavy?

A. Oh, yes, top-heavy. And to complete the voyage from Nagasaki to the China Sea and Indian Ocean, it is important and necessary to prepare for the safety of the voyage, so it is necessary to be in-

(Deposition of Y. Yamamoto.)

spected to see if there is any hurt to the stability of the vessel at Nagasaki. So to assure the firmness of the stability, the vessel has been inspected, to make sure, by the examination.

Q. Did you request the survey or did your owners request it? (Interpreted.)

A. I made it myself; I have no time to ask my head office, and I called for it.

Q. Did you call it because you knew this law suit was going on? (Interpreted.)

A. No. I did not know about this at that time. (Interpreted) I prepared for the future voyage; I did not know a suit was coming.

Q. Why, do you say you did not know about the suit; you knew your ship had been seized in Portland.

A. (Interpreted) Of course I heard of the suit, that it was pending against the ship, but my business was not to attend to such things, but my business is to carry on navigation safely.

Q. Which would decrease your stability more, Captain, the using up of the water out of the ballast tanks and using your coal, or getting the lumber wet on deck? (Interpreted.)

A. Of course the using of the ballast tank water is more effective.

Q. You said you remembered that when you were considering this voyage, when Mr. Hayden asked you what you had in mind about your stability, and you said you had in mind the ballast

(Deposition of Y. Yamamoto.)

tanks, coal and the possibility of this deck load getting heavy. Do I understand then that you were not influenced so much by the fear of the deck load getting heavy, as by the fear of the ballast tanks emptying and coal being used, decreasing your stability? (Interpreted.)

A. (Interpreted) I do not understand.

(Question read and interpreted, section by section.)

A. (Interpreted) I had in mind in considering the stability of the ship that the use of the water would come first and the coal, and then the wetting of the deck cargo.

Q. That is all.

RE-DIRECT EXAMINATION.

(By Mr. Hayden):

Q. What other company in Japan is bigger than your company?

A. The Nippon Kaisha.

Q. Do they run steamers, Japan to Bombay?

A. Yes.

Q. Do they carry deck loads during the monsoon and typhoon seasons?

A. No, they never carry deck cargoes throughout the whole season. That is the company's regulation,—that is, all the captains would not take them.

Q. Did you make any voyages through the In-

(Deposition of Y. Yamamoto.)

dian Ocean to Bombay in any other ship than the "Saigon Maru," as captain?

A. No.

Q. Or as officer?

A. No.

Q. On seven trips to Bombay?

A. Yes.

Q. Did you make any trips through the Indian Ocean as a captain other than on the "Saigon Maru"?

A. No.

Q. Where did you make your trips in the twenty years you have been sailing?

A. As apprentice and when I am fourth officer, and by European line steamers, as student after I finished my school.

Q. Have you made many trips through the China Sea?

A. Oh, yes, a hundred times.

Q. From where?

A. From Hong Kong to Formosa, Korea, and ports on the China coast.

Q. As captain or officer?

A. Captain, about four years. That is my longest experience, as a captain, on the China coast, so that I know very well about the China Sea and typhoons and what terrible things.

(Deposition of Y. Yamamoto.)

RE-CROSS EXAMINATION.

(By Mr. Wood) :

Q. Did the Pacific Export Lumber Company tell you that they would suffer large damages if you did not take this cargo?

Mr. Hayden: Objected to as immaterial.

A. I received the letter. I know.

Q. Did they tell you that they had sold this lumber in Calcutta?

Mr. Hayden: Same objection, immaterial.

A. They did not tell me exactly, but they told me about it.

RE-DIRECT EXAMINATION.

(By Mr. Hayden) :

Q. They did not tell you anything about that before the charter party was made, did they? (Interpreted.)

A. No, sir.

Q. Only after you refused to take more cargo?

A. Yes.

Q. After you cut your wooden piers off, they sent that letter?

A. Yes.

Q. And that is not the first letter?

A. No.

(Witness excused.)

(Signature waived.)

(Deposition of Y. Yamamoto.)

STIPULATION.

It is stipulated that at the time of the execution of the charter party mentioned in the libel herein and at all times since, the claimant herein, Osaka Shosen Kaisha, was and still is a corporation organized and existing under and by virtue of the laws of Japan, with its principal place of business at Osaka in said country, and was during all of said times and is still the owner, in possession and engaged in the operation of said steamer "Saigon Maru" which was at all of said times and still is a Japanese vessel, and not a vessel of the United States or of the State of Oregon, nor constructed in said state.

(Hearing closed.)

LIBELANT'S EXHIBIT A.—YAMAMOTO

"Pacific Export Lumber Co.,
1004 Chamber of Commerce Bldg.,
Portland, Oregon, June 2, 1917.

Captain Y. Yamamoto,
Master of 'Saigon Maru,'
Portland, Ore.

Dear Sir:

We are informed that you caused the stanchions that have been supplied for your deck load to be cut down to lengths of 7 ft., (thus reducing them from 14 ft., which length is necessary to enable you to carry the deck load approved by the marine surveyors).

(Deposition of Y. Yamamoto.)

And we hereby notify you again that we shall not clear the ship until she has loaded a full cargo of lumber in accordance with the charter party, or until you shall have paid such damages as we suffer or are likely to suffer from your refusal to load in accordance with your charter party.

We also confirm our statement to you that if you carry 500 M ft. less on deck than the steamer is capable of taking, you are causing a loss to your owners of some \$27,000.00 in the way of freight; you will also be causing us a serious loss in the way of our not being able to ship lumber that we contracted to forward by your steamer, and that you will cause great damage and loss to the buyers of the cargo at Bombay, which we have no doubt they will proceed to collect of the ship at that port.

We therefore notify you that unless you proceed to load the balance of your deck load in accordance with the report of the marine surveyors, and continue to load same until you have a full cargo of lumber both under and on deck, we shall proceed immediately to libel your ship and collect our damages.

Yours faithfully,

PACIFIC EXPORT LUMBER CO.,

By Wm. D. Wheelwright, President."

(Deposition of Y. Yamamoto.)

CLAIMANT'S EXHIBIT NO. 3—YAMAMOTO.

"Pacific Export Lumber Co.,
1004 Chamber of Commerce Bldg.,
Portland, Oregon, June 4, 1917.

Captain Y. Yamamoto,
S. S. 'Saigon Maru,'
Portland, Oregon.

Dear Sir:

At the request of your agent, Mr. Orrett, we hereby instruct you to proceed as soon as you are ready to Bombay, India, (via Nagasaki for coal). Your vessel is consigned to Osaka Shosen Kaisha, Bombay.

Yours faithfully,

PACIFIC EXPORT LUMBER CO.,

By A. Mathews, Secretary."

UNITED STATES OF AMERICA, Western Dist. of Washington Southern Division, County of Pierce, State of Washington.	}	ss.
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I hereby certify that in pursuance of the stipulation of counsel, dated February 12, 1918, and hereby annexed, on Tuesday the 12th day of February, 1918, at the hour of 10 o'clock A. M. of said day, before me, C. D. Savery, a notary public in and for the State of Washington, residing at Tacoma in said state, and the notary mentioned in said stipulation, at the law office of Huffer & Hayden, Room 410 Fidelity Building, in the city of Tacoma, county of

(Deposition of Y. Yamamoto.)

Pierce, State of Washington, personally appeared Y. Yamamoto, the witness named in said stipulation and called on behalf of claimant in that certain cause pending in the District Court of the United States for the District of Oregon, entitled, *Pacific Export Lumber Company, a corporation, libelant, vs. The Japanese Steamer "Saigon Maru," her tackle, apparel, etc., Respondent, and Osaka Shosen Kaisha, Claimant*, and numbered 7467, Mr. Erskine Wood, Esq., of Portland, Oregon, appearing as proctor for said libelant, and F. A. Huffer, Esq., and W. H. Hayden, Esq., both of Tacoma, Washington, appearing as proctors for said claimant; and the said witness, Y. Yamamoto, having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in said cause, and carefully examined, then and there deposed and said as appears by his deposition hereto annexed.

I further certify that prior to the examination of said witness one M. Takahashi, by agreement of counsel acted as interpreter to assist in said examination, and that prior to said examination said Takahashi was by me first duly sworn to correctly and truthfully interpret the questions to be propounded to said witness and the answers of said witness to such questions, and that in the course of said examination said Takahashi assisted in the examination of said witness in the manner and to the extent indicated in the foregoing deposition.

I further certify that said deposition was, by

(Deposition of Y. Yamamoto.)

consent of counsel, by me personally then and there taken down in shorthand notes and there after reduced to typewriting; that the reading of said deposition by or to the said witness and the signing and subscription of same by him were waived by counsel for both libellant and claimant.

And I further certify that I have retained the said deposition in my possession for the purpose of mailing the same with my own hands to the Clerk of the United States District Court for the District of Oregon, the court for which the same was taken.

And I do certify that I am not of counsel or attorney to either of the parties to said cause nor interested in the event of said cause.

In witness whereof I have hereunto set my hand and affixed my official seal at Tacoma, Pierce County, Washington, on this first day of March, 1918.

C. D. SAVERY,

Notary Public in and for the
State of Washington, residing
at Tacoma, Pierce County,
in said State.

(Notary's Seal)

Notary and stenographer's fees paid by Claimant, \$40.00.

Filed April 24, 1918.

G. H. Marsh, Clerk,

By F. L. Buck, Deputy.

DEPOSITION OF TORU YAMAGUCHI, a WIT-
NESS FOR CLAIMANT.

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a Cor-
poration,

vs.

Libelant,

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.,

Respondent.

OSAKA SHOSEN KAISHA, a corporation organ-
ized and existing under the laws of Japan,
Claimant.

STIPULATION.

It is stipulated and agreed by and between the above named libelant, Pacific Export Lumber Company, and the above named claimant, Osaka Shosen Kaisha, through their respective proctors, that the deposition de bene esse of Toru Yamaguchi, a witness on behalf of said claimant, may be taken at the office of Huffer & Hayden, Room 410 Fidelity Building, in the City of Tacoma, Washington, on Tuesday, the 26th day of March, 1918, at the hour of 9 o'clock A. M. of said day, upon oral interrogatories and cross-interrogatories before C. D. Savery, a Notary Public in and for the State of Washington, residing in said city, without commission or other authority or power and without notice; and the tak-

(Deposition of Toru Yamaguchi.)

ing of said deposition may be adjourned from time to time to suit the convenience of such Notary and said witnesses. The certificate and seal of said Notary shall be sufficient proof of his name, signature and official character without other and further authentication or proof; and any and all preliminaries to the taking of such deposition required by law or rule of Court are hereby dispensed with, and the reading of said deposition to or by said witness and the signing of the same by him are hereby waived. Said deposition when taken shall be enclosed in a sealed envelope by said Notary and directed to the Clerk of the above entitled Court, and either delivered to said Clerk by said Notary or transmitted to said Clerk through the mail or by some private person, and may be read in evidence by either party, subject only to the objections (to be taken at the time of the examination of said witness) as to the competency, materiality or relevancy of the testimony therein set forth. And all other objections thereto and all objections to the taking of said deposition as aforesaid, are hereby expressly waived.

Dated this 26th day of March, 1918.

ERSKINE WOOD,

Of Proctors for Libelant.

F. A. HUFFER,

W. H. HAYDEN,

HUFFER & HAYDEN,

Proctors for Claimant.

(Deposition of Toru Yamaguchi.)

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a Corporation,

Libelant

vs.

THE JAPANESE STEAMER "SAIGON MARU"
her tackle, apparel, etc.,

Respondent

OSAKA SHOSEN KAISHA, a corporation organized and existing under the laws of Japan,

Claimant

DEPOSITION OF TORU YAMAGUCHI

Taken on behalf of the above named claimant pursuant to the annexed stipulation, at 410 Fidelity Building, Tacoma, Washington, on the 26th day of March, 1918:

The libelant appearing by Mr. Erskine Wood, of proctors for libelant,

The claimant appearing and being represented by its proctors, Messrs. Huffer & Hayden, by Mr. F. A. Huffer.

Whereupon the following proceedings were had and done, to-wit:

TORU YAMAGUCHI, the witness above named, being produced and sworn on behalf of the claimant, testified:

(Deposition of Toru Yamaguchi.)

DIRECT EXAMINATION.

(By Mr. Huffer)

Q. What is your full name?

A. Toru Yamaguchi.

Q. How old are you?

A. Thirty six, next September.

Q. Where do you live?

A. Kobe, Japan.

Q. What is your present occupation?

A. Master of the Steamship Alps Maru.

Q. Are you about to leave for Japan with the Alps?

A. Yes, sir, Wednesday night or Thursday morning.

Q. What education have you had, Captain, to qualify you for the sea?

A. I have had five years in school and training ships—nautical school.

Q. What school?

A. Shosen Gakko college.

Q. Where?

A. At Tokyo.

Q. Is that the Imperial college there?

A. Yes, sir.

Q. How old were you when you were graduated at the nautical college?

A. Eighteen years old; that was in 1901.

Q. What positions did you hold after that? State briefly.

(Deposition of Toru Yamaguchi.)

A. Third officer of steamer. That was after my graduation. Then I was promoted to second officer about two years after that.

Q. How many years were you third officer, approximately?

A. I should have stated that I was graduated in February, 1904, and promoted to second mate in August, 1905, and to first officer in October, 1906.

Q. When did you become master?

A. To master in November, 1909.

Q. And have you been master of vessels ever since?

A. Yes, sir.

Q. When did you enter the employ of the Osaka Shosen Kaisha?

A. In August, 1906, as second officer.

Q. In whose employ were you before that?

A. Nippon Yusen Kaisha. N. Y. K.

Q. What character of vessels were those on which you were third officer, second officer and first officer, and master?

A. All steamers.

Q. Large steamers?

A. Of varying size, between twelve hundred tons and eight thousand tons, gross tonnage.

Q. Since you have been master, what size vessels have you been master of?

A. The same size; eight thousand ton steamers.

Q. How long have you been master of large ves-

(Deposition of Toru Yamaguchi.)

Q. Vessels of the type plying between United States and Japan?

A. Six years.

Q. How many trips have you taken as master from Japan to the United States?

A. Eleven passages.

Q. That is eleven round trips?

A. Yes, sir.

Q. Where was your other experience outside of the experience between United States and Japan—in what seas?

A. North Pacific Ocean and China Sea.

Q. How many years have you had experience navigating in the China Sea?

A. About six years.

Q. To what extent have you had experience in navigating in the Indian Ocean from Japan to Bombay?

A. Ten voyages.

Q. In what vessels?

A. The "Saigon Maru".

Q. All of the ten voyages in the "Saigon Maru"?

A. Yes, sir.

Q. In what seasons of the year?

A. All seasons.

Q. What position did you hold on the "Saigon Maru" on those trips?

A. Master, sir.

Q. How long were you master of the "Saigon"?

A. Two years and eight months.

(Deposition of Toru Yamaguchi.)

Q. Did you navigate her anywhere else beside from Japan to Bombay?

A. No.

Q. Did you make any other trips on the "Saigon Maru" beside the ten trips which you made to Bombay?

A. Yes, sir.

Q. Where?

A. From Kobe—I better say from Yokisha, the most eastern port of Japan, to Bombay.

Q. Did you make any coast-wise trips on the "Saigon"?

A. Yes, from the northern part of Japan to Kobe.

Q. How many trips of that kind did you make?

A. Only one.

Q. What is or what was the construction of the water ballast tanks of the "Saigon Maru"?

A. I would say the common construction.

Q. What about the presence or absence of a longitudinal section?

A. Yes, she had longitudinal sections, with holes through the sections.

Q. Was that true of all of the water ballast tanks on the vessel?

A. Yes. You cannot use it in trimming tanks.

Q. How many of those water ballast tanks were there?

A. Five.

Q. What is the effect upon the vessel of having

(Deposition of Toru Yamaguchi.)

holes in those longitudinal sections so that the water would pass from one side to the other?

A. The water has free surface for passage from one to the other.

Q. That is from starboard to port?

A. Yes, sir.

Q. What is the effect of that when the vessel heels?

A. The water will come to one side.

Q. What effect does that have, if any, upon the tenderness of the vessel?

A. It reduces stability.

Q. What effect does it have upon its righting—as to quickness or slowness of righting?

A. It makes it slower—reducing the lever of stability—caused by the shifting of the center of gravity to the side.

Q. Is there anything peculiar about the steering gear of the "Saigon Maru"?

A. The steering rod passes through the upper edge of the bridge deck to the poop deck; in other words connects the engine and rudder head between the poop deck and bridge deck on the upper part.

Q. That is in the aft part or fore part of the vessel?

A. The aft part.

Q. What about the steering rod; does it lay down on the deck?

A. No, it rests on the stanchions.

Q. And what do the stanchions rest on?

(Deposition of Toru Yamaguchi.)

A. They rest on the deck, or on top of the rail or bulwark.

Q. About how far above the bulwark do they rise?

A. About four feet I think.

Q. And the steering rod passes through the top of these stanchions?

A. Yes, sir.

Q. What other ways are there of connecting the rudder head with the engine; that is, what other ways are there of placing the steering rod?

A. No other way.

Q. As to other ships; do all ships have steering rods on the stanchions rising above the board?

A. No; there are such ships as have the steering engine aft. In such type the rudder head connects with a chain.

Q. But what I am speaking of is this: do all vessels have the steering rod rising above or resting upon the stanchions?

A. No; they are laid on the deck; that is the common type I think.

Q. Now in the case of a deck cargo on the "Saigon Maru", the part that is placed aft; is there any danger in loading above the bulwark rail, so far as the steering gear is concerned?

A. Yes, I think so.

Q. Explain that.

A. If I put the deck load in the after part higher

(Deposition of Toru Yamaguchi.)

than five feet in that part it will cause the stanchions to bend or come outside by the sag of the load.

Q. That is by the movement of the deck load?

A. Yes, sir, and that makes the steering useless.

Q. Is there any way, Captain, of lashing the deck load so that it will not be moved against the steering rods?

A. No, it is quite impossible I guess.

Q. In the other kind of steering gear on other vessels where the steering rod passes along on the deck of the vessel how do you prevent the shifting of the load from injuring the steering gear?

A. We put in some wedges between the bulwark and cargo or between the hatch coaming and cargo.

Q. Either between the bulwark and cargo or hatch coaming and cargo?

A. Yes, there are two ways of leading it, one underneath the bulwark, and another passing the center along the hatch coaming.

Q. So that with reference to the vessels where the steering rod passes along the deck of the vessel next to the bulwark, you wedge between the cargo and bulwark?

A. Yes, sir.

Q. But where the rod passes along side the hatch coaming?

A. Then we put the wedge between the hatch coaming and cargo.

Q. Now, Captain, in case the "Saigon Maru" was loaded with lumber, a full load in the hold, of 2,436,-

(Deposition of Toru Yamaguchi.)

800 feet, how much lumber could be loaded or should be loaded on deck in case the vessel was at Portland, Oregon, leaving in the first part of June, touching at Nagasaki, and going through to Bombay?

A. Please explain as to bunkers on the bridge deck—that is, I mean the weight of the coal.

Q. But you have the vessel, the "Saigon Maru", and have loaded her with 2,436,800 feet in the hold, and the hold is full; now, Captain, how much additional cargo can you place on the deck for that voyage?

A. But we should consider the bunker coal on the bridge deck and water in the tanks. I would want to know the state of the bunker coal.

Q. Where you have 500 to 550 tons in deck bunker and 200 tons in 'tween deck bunker and 500 tons in cross bunker, and all ballast tanks full.

A. That would be about eight hundred eighty-three (883) tons. In my experience I can say, with bottom weight, with water in tanks, is 150 tons heavier than the deck load; that means both bunker coal and cargo; so that if bottom weight or water in tanks is 883 tons minus 150 tons, making 733 tons for the weight on deck, in the best condition.

Q. That represents what on deck?

A. That is the weight of both bunker and cargo.

Q. And deducting the bunker coal what have you?

A. Deducting the bunker coal 500 tons, the deck load would be 233 tons in weight.

(Deposition of Toru Yamaguchi.)

Q. Then on the "Saigon Maru" with bunker coal as described and with ballast tanks full as described and with 2,436,800 feet, how much additional weight of cargo could be placed on deck?

A. Two hundred thirty-three tons in weight.

Q. Under the circumstances described then, what is the maximum amount of deck cargo the "Saigon Maru" could have carried from Portland on the voyage described, beginning the first part of June?

A. Well, not more than the bottom weight. I think that would add one hundred fifty tons more.

Q. That is, how much cargo in weight could have been carried on deck under those circumstances?

A. Three hundred eighty-three tons; but I think with that the ship would have been a little tender.

Q. That is, with how much cargo on deck?

A. 383 tons.

Q. Then to be specific, with the hold filled as described and water ballast and coal, how much lumber could have been placed on deck with safety for such a voyage?

A. Three hundred eighty-three tons.

Q. You say the vessel would be a little tender under those circumstances?

A. Yes, I think so.

Q. Then what would be the best condition of stability?

A. With one hundred fifty tons more bottom weight.

Q. But answer specifically as to the amount of

(Deposition of Toru Yamaguchi.)

lumber that should have been placed on deck for the best stability.

A. Two hundred thirty-three tons.

Q. What observations have you made or what have you noticed in the course of your experience with the "Saigon Maru" with respect to the way the vessel behaves under different kinds of loading; have you observed her when she was a little too tender, and when she was a little too stiff?

A. Yes.

Q. Will you explain the conditions of your actual experience with the vessel?

A. Yes. First I will explain the condition with full cargo of cotton in the hold and some on deck. At that time we had some 200 tons of coal on deck, that is on the bridge deck, and 178 tons of cotton on deck too—on the poop and bridge deck, and furthermore, I had some 70 tons of onions on deck, and the hold full of cotton. Beside on the bridge deck we had some 225 tons in 'tween deck of coal and 240 tons in cross bunker, and 235 tons in pocket bunker; the total amount of coal would be nine hundred tons in that case. The condition of the tanks, number two and number four full of salt water, number three aft peak and fresh water tanks full with fresh water; total quantity of water in bottom 616 tons; total weight on deck 448 tons. In such a state, in a voyage between Bombay and Japan in any season should would behave in the best condition; that means not too stiff nor too tender, with slow rolling

(Deposition of Toru Yamaguchi.)

motion. So that I think that is the best condition in the "Saigon Maru". Next we will experience some tender condition. The hold and poop full with general cargo, like safety matches, tea chests, porcelain, cotton goods, China merchandise, etc., about one hundred fifty (150) tons weight of vegetables on deck. Bunker coal, 550 tons on bridge deck, that is deck lumber; 'tween deck bunker 300 tons; No. 2 hold 250 tons; cross bunker 240 tons; pocket bunker 235 tons. Tanks, No. 1, 2 and 4, full with sea water; No. 3, aft peak and fresh water tanks full with fresh water. Under those conditions we had some 770 tons weight on deck and 742 tons in tanks. In that condition she was too tender. She heeled to port or starboard and quite hard to keep her upright, but that was a voyage between Hong Kong and Singapore in good season.

Q. By good season, you mean what?

A. In the monsoon season, not the typhoon season.

Q. Now, Captain, you speak of a cargo of cotton from Bombay. How does cotton come—how much in a bale?

A. Four hundred pounds to the bale; about eleven cubic feet in size.

Q. And how many cubic feet make a ton in that?

A. 2240 pounds, that is a long ton.

Q. How does the weight of Bombay cotton compare with the weight of lumber?

(Deposition of Toru Yamaguchi.)

A. I think they are nearly the same, but the cotton can store in better condition in the hold.

Q. Then what do you figure the weight of cotton and lumber per cubic foot?

A. About thirty-six pounds I guess.

Q. You speak of a miscellaneous cargo from Japan to Bombay. About how much would that weigh per cubic foot?

A. You mean the measurement to be stored in the hold? The average is forty feet to the ton.

Q. When you speak of your vessel being too tender, how does it behave when struck by a beam wind?

A. She heels over on the side, and keeps that state unless struck by another wave.

Q. And then what would happen?

A. If she had big waves she would roll over in a jerky motion.

Q. And then what would finally happen?

A. Generally the next sea, if the weight on board is in condition, she was all right; but if the cargo shift she would probably capsize.

Q. Now about your steering gear; what if the lashings of the deck cargo in the aft part of the vessel should break and lumber go overboard, what effect would that have on the steering gear?

A. Probably it would make some damage to the steering rod and stanchions.

Q. Now if your steam steering gear gets out of order so that it won't work, what do you have to do?

(Deposition of Toru Yamaguchi.)

A. Disconnect the rudder head with the engine and connect with the hand gear.

Q. Is this hand gear covered by a cabin on the "Saigon Maru" or on the open deck?

A. It is open; it is not covered.

Q. What about the ease or difficulty of connecting up the hand gear?

A. It would be all right in smooth weather, and can fix it in the harbor, but in the sea way if we disconnect from the steering gear the rudder will move violently by the weight and quite hard to connect it with the hand gear. Some times it takes a long time to connect it.

Q. In case you should get into a typhoon or into any other storm that would cause waves to wash over the deck, how would you go about connecting your hand gear if your steam steering gear should be out of order?

A. It would be quite a hard job, because the ship would come in the trough of the sea and roll and the rudder shakes violently, and sometimes it is impossible to connect with the hand gear, and it might cause the ship's disaster.

Q. In case you should succeed in connecting up the hand gear would that be efficient in case of rough sea, to handle the vessel properly?

A. I do not think so.

Q. What are the difficulties if any in handling the vessel with the hand gear?

A. It is quite hard to keep a right course even

(Deposition of Toru Yamaguchi.)

in smooth weather and in a rough place she will swing among the sea and quite hard to steer.

Q. If she is thrown off her course what about the quickness or slowness of getting back on the course with the hand gear?

A. It is much slower; you take the rudder hard over and she would fly off another way, and it is hard to keep the course. If she heads over that way, she would come from the other way while steering; and moreover we cannot steer in high speed with the hand gear; so that in case of running before the wind we are probably overtaken by the waves.

Q. That is, the waves would break over the poop?

A. Yes, sir. So that it would cause the steersman to be washed overboard, being in the open air.

Q. Why can't you sail fast with the hand gear?

A. There is too much friction I guess in the screw in the rudder head.

Q. What kind of screws have you on the "Saigon Maru", single or double?

A. Oh, a single screw propeller—but I did not mean that. I referred to the screw in the hand gear.

Q. (Mr. Wood) You mean the worm?

A. Yes.

Q. What is the speed of the "Saigon"?

A. Nine knots in full speed.

Q. How does that compare with the speed of other vessels of its class engaged in the same trade?

(Deposition of Toru Yamaguchi.)

A. The average speed of the modern boat of the kind is ten knots.

Q. When going from Japan to Singapore, do you ever take a deck load in the typhoon season?

A. Probably not.

Q. You say probably, but did you ever take it in your navigation?

A. No, I never did.

Q. What is customary with vessels from Japan and Singapore through the China Sea in the typhoon season about carrying deck loads?

A. I think it is not customary to have deck loads.

CROSS EXAMINATION.

(By Mr. Wood) :

Q. The cargoes carried from Japan to Bombay are not the kind that go easily on deck, are they? They are cotton and general cargoes, onions, etc.

A. Onions from Bombay to Singapore, but not Japan. From Japan to Bombay we carry general cargo.

Q. You never load general cargo on deck in any part of the world?

A. No; except some dangerous cargo, such as explosives.

Q. But there are no ships going from Japan to Bombay carrying lumber alone?

A. No.

(Deposition of Toru Yamaguchi.)

Q. Now you say that the "Saigon" does have longitudinal sections in her ballast tanks?

A. Yes, sir.

Q. The reason I ask is because Captain Yamamoto said she did not have them.

A. Well, what is meant by the section—do you mean the girder?

Q. No; you say that the ballast tanks have steel sections running lengthwise with the ship?

A. Yes.

Q. Through the tanks, with holes in the sections?

A. Yes.

Q. To let the water pass back and forth?

A. Yes.

Q. But Yamamoto said she did not have those, and I wondered about the contradiction.

A. Well, there are no such ships without longitudinal sections, but holes in them.

Q. Do all ships have holes in them?

A. Some not.

Q. What is the purpose of the holes?

A. To have a free passage of the water.

Q. Why do you want the water to pass freely?

A. To fill up in one pipe.

Q. But if you had longitudinal sections without holes, then you would have to have two pipes?

A. Yes, to pump in or out.

Q. And that method gives you better control of the water, does it?

(Deposition of Toru Yamaguchi.)

A. Yes.

Q. In the method of construction on the "Saigon", if the ship heels over all the water from one side of the ballast tanks runs to that side, which is as if there were no longitudinal section?

A. Just the same.

Q. So that the longitudinal section is there for strength but not to keep the water from flowing back and forth?

A. Yes.

Q. But in the more modern boats they have the longitudinal section tight, and two pipes?

A. Yes—but in some parts—the engine and boilers.

Q. I do not understand.

A. Some parts have holes for the free passage, and some tanks have no holes, to be used as trimming tanks. For example, in my boat, the Alps, she has three tanks with longitudinal sections without holes, and four which have holes for free passage.

Q. Except the trimming tanks?

A. The trimming tanks haven't holes.

Q. What is it that makes the "Saigon" a tender ship, or is the "Saigon" more tender than other ships of her kind?

A. Under what condition?

Q. Well, generally; Captain Yamamoto said she was quite a tender ship generally; do you say she is?

(Deposition of Toru Yamaguchi.)

A. Generally speaking, I think so.

Q. Well, why is she a tender ship?

A. I cannot say particularly. That comes from experience in the given case.

Q. But if she had the longitudinal sections without holes in the ballast tanks and two pipes and better control of the water, so that it would not wash from one side to the other, she would not be so tender?

A. Yes, she could control it more easily.

Q. And this water going to one side when the tanks are partly empty, that makes her more tender and harder to right?

A. Yes, sir.

Q. What other types of steering gear are there on vessels. I understand in some it is led along the deck covered up and protected, but do not some vessels have a steering gear entirely aft on the poop?

A. Yes.

Q. Without any connection from the poop to the bridge?

A. Oh, no, no.

Q. Now, what other types of steering gear are there beside the steering rod running through the stanchions on the rail, and the connection led along the deck?

A. In my boat it is the telanotor type, underneath the deck.

Q. That is a system of pipes leading from the bridge to the engine aft.

(Deposition of Toru Yamaguchi.)

A. Yes.

Q. And controlled through liquid pressure?

A. Yes, sir.

Q. That is the system of steering gear now generally adopted?

A. Well, that is something of a new type; I cannot say whether general.

Q. Aren't most ships built with that system now?

A. No, I don't think so.

Q. It is perfectly possible, isn't it, to have the steersman protected from the weather by housing him in?

A. With the hand gear?

Q. Yes.

A. If they have such a type.

Q. But lots of ships are building with hand steering under cover, aren't they?

A. Well, but it depends upon the position of the hand steering gear, but mostly it is on the poop deck.

Q. But many ships have the hand steering gear under the poop deck?

A. Yes, sir.

Q. In which case there is no danger of the man being washed overboard?

A. No.

Q. Now, you speak of securing the deck cargoes of lumber with wedges?

A. Yes, sir.

(Deposition of Toru Yamaguchi.)

Q. Could not a deck cargo be secured by wedges on the "Saigon Maru" so as to protect the hand steering rod?

A. No.

Q. Why not?

A. Nothing against the cargo, and cargo is so high, and the chain spread.

Q. How many lumber cargoes have you carried from Pacific ports to the Orient?

A. I haven't had any experience.

Q. You have not carried any?

A. No.

Q. Are you taking lumber cargo on the Alps Maru?

A. Yes, in the hold. I had some experience on deck—not the Pacific Coast Lumber Company.

Q. But I mean, have you carried any cargoes of lumber from Pacific Coast ports to the Orient?

A. Oh, yes, from Tacoma and Vancouver.

Q. When?

A. About two years ago.

Q. How many such cargoes have you carried?

A. Probably not more than 150 tons.

Q. It was not a full cargo of lumber?

A. No. Deck cargo only.

Q. You had general cargo in the hold?

A. General underneath, yes.

Q. Is that the only deck cargo you carried?

A. Yes, no coal.

(Deposition of Toru Yamaguchi.)

Q. What kind of steering gear did you have on that ship?

A. Hand gear beside, under the poop, and rod passed through along the hatch coaming.

Q. Have you ever seen them load these deck cargoes up twelve or even fourteen feet high, putting heavy beams upright wooden stanchions between the cargo and bulwark rail?

A. Yes, sir.

Q. Beams perhaps eight by ten or six by eight—something like that, and then cable lashings?

A. Yes, I have seen it.

Q. Do you say it is impossible to load in that manner where these upright beams are like wedges between the cargo and rail and that it is impossible to load in that way and keep the cargo from shifting against the steering rods?

A. In the "Saigon Maru", you mean?

Q. Why not?

A. You can fix the wedge between the cargo and wooden stanchions, but no way to keep the stanchion against anything, and cable lashing is not enough to protect against the sagging; it will sag.

Q. How do you know—as you have never carried one?

A. But I can guess.

Q. I am illustrating a cross section of deck load, and these are the rails here, and these the big wooden upright stanchions.

A. Yes.

(Deposition of Toru Yamaguchi.)

Q. This is the steering rod and stanchion.

A. Yes.

Q. This is the wedge down here and the cargo is against it here (indicating).

A. Yes.

Q. How is this wooden stanchion going to sag over against that rod when it is both lashed here with steel cables and wedged in against the cargo and against the rail?

A. This is about three feet here (indicating) and the distance here is about ninety feet. It could not be kept; it can surely sag.

Q. Then you would say there is no way of fixing it?

A. Yes.

Q. Now let me see if I understand your method of calculation of what you can put on deck.

A. Yes.

Q. You take the total tonnage of your water in the tanks?

A. Yes.

Q. And you subtract 500 tons from that?

A. No; 150 tons.

Q. And that gives what?

A. That gives the best condition in the cotton case.

Q. That gives the amount you can put on your deck load?

A. Yes, sir.

(Deposition of Toru Yamaguchi.)

Q. Now, you had in this case 883 tons of water in the "Saigon" when she carried the lumber?

A. Yes, sir.

Q. How much do you take off from the 883 tons?

A. One hundred fifty.

Q. That gives 733 tons?

A. Yes, sir.

Q. What is that?

A. That is the total weight on deck.

Q. But in that you include your coal in the deck bunker?

A. Yes.

Q. And that in this particular case on this voyage was five hundred tons?

A. Yes, sir.

Q. Would it have been possible to load less coal in the deck bunker and take more lumber cargo instead?

A. If you could put in the bunker some big lumber—suppose there are shore cranes in Portland?

Q. I do not know about that.

A. In Bombay we get the cotton in the bunker, placed with the shore crane; but without the shore crane it would be impossible to put the lumber into the bunker space.

Q. I didn't mean that. I understand, Captain Yamamoto wanted to carry about 1200 tons of coal?

A. Yes.

Q. And he had 200 tons in the 'tween deck bunkers and about 500 tons in the hold cross bunker?

(Deposition of Toru Yamaguchi.)

A. Yes, sir.

Q. And 500 in the deck bunker?

A. Yes.

Q. Now, could he have loaded that deck bunker coal in other bunkers lower down, or were there any other bunkers?

A. He could have put it in the hold instead of the deck bunker.

Q. How much would it hold?

A. As much as you like; simply put it in the hold.

Q. What is the capacity of the hold bunker?

A. Oh, no, any amount. But in that case there was no hold bunker.

Q. He said he had 500 tons in the hold bunker.

A. That is the hold cross bunker.

Q. Then he could have loaded 500 tons more lumber on deck if he had put 500 tons of coal somewhere else?

A. Oh, yes, but meanwhile it removes the space from the hold for 500 tons.

Q. But the coal is so much heavier than the lumber that it would be advantageous to put the coal down below where it is heavy and has less bulk and put the lumber up on deck.

A. But it would come up higher than the coal; that would make the lumber higher than the coal.

Q. But the stability would have been the same if he had taken more lumber and put the coal below.

A. No, I do not think so, because the lumber

(Deposition of Toru Yamaguchi.)

would be higher than the coal. I cannot say exactly as to that but I think it would be rather worse.

Q. If you had been master of the "Saigon" and had been expected to carry all that she safely could carry, would you have loaded the deck bunker with 500 tons of coal?

A. Yes, sir. It could not help.

Q. What do you mean by that?

A. Of course we put not such a heavy weight on deck, but if we do not put the coal in that place we use the space in the hold and that would reduce the carrying space.

Q. But the 500 tons of coal is not so bulky, is it?

A. Oh, yes; about forty-five cubic feet per ton of weight of coal; it is quite bulky.

Q. Now, in figuring this calculation about the deck load, don't you have to take into consideration what kind of cargo is under deck?

A. In the cotton case, it was all cotton, and in the other the general cargo, so that I think it would be the same thing.

Q. But this rule of yours of taking 150 tons off and the balance is what you can carry on deck—is that a rule that you can apply to all kinds of cargo, or does it make some difference what you carry?

A. Oh, yes, of course.

Q. If you are carrying cotton, that is not very heavy?

A. No.

(Deposition of Toru Yamaguchi.)

Q. If you are carying cotton cargo and you apply this rule of subtracting 150, the same rule might not apply if you are carrying a heavier cargo under deck?

A. Of course not.

Q. So that if lumber is heavier than cotton, you could carry a greater weight on deck?

A. Yes, sir.

Q. In other words, if lumber is heavier than cotton, you would not subtract as much as 150 tons?

A. No.

Q. Did you state what was the weight of cotton per cubic foot in this voyage which you had in mind?

A. Yes; thirty-six pounds. 400 pounds for 11 cubic feet.

Q. On this particular voyage with the lumber, 233 tons would be the ideal deck load?

A. Yes, sir.

Q. That would be the perfect condition?

A. Yes.

Q. But you think she could have carried about 150 tons more with safety?

A. Yes.

Q. When you made your estimate of 233 tons as being the perfect condition, did you know how much she did carry on this voyage on deck?

A. How is that?

Q. Do you know how much the "Saigon Maru" did take on this voyage, in this lumber case?

(Deposition of Toru Yamaguchi.)

A. Well, about 330 tons, I guess; I do not know the exact quantity.

Q. You do not know what she did?

A. Not the exact quantity.

Q. Do you know about what she took?

A. Yes, about 330 tons I guess.

Q. When did you learn how much she had taken on this voyage?

A. Here; about the time I came in port here.

Q. But your rule of subtracting 150 was based on your experience with her particularly in carrying cotton.

A. Yes, sir.

Q. You spoke of having salt water in some of your tanks on some of these voyages?

A. Yes, sir.

Q. Can you interchange salt water with fresh water in your tanks?

A. No.

Q. When one tank is empty and your stability is not so good on account of the tank being empty, having used up your fresh water, can you fill it with salt water?

A. No.

Q. Why not?

A. It is not necessary.

Q. But suppose that you left with your tanks full of fresh water, which you use as you go along?

A. We use the deck bunker first.

Q. Now, let us start again. Suppose Captain

(Deposition of Toru Yamaguchi.)

Yamamoto starting from Portland with this lumber, his water tanks full of fresh water, and he uses part of it as he goes along?

A. Yes, sir.

Q. Now, when he uses up one tank of fresh water, his stability is not quite so good.

A. That is true.

Q. Can he fill salt water into that tank?

A. Yes, sure.

Q. And make his stability better again?

A. Yes; but it would not be so when it was only half empty.

Q. But when entirely empty?

A. Yes.

Q. And that would make his stability better again?

A. Yes.

Q. I think he said that he could not empty his tanks completely.

A. Yes.

Q. The suction is not strong enough to take it all out, leaving about twenty tons in it. Now when he has taken out all he can, he could fill in salt water?

A. Yes.

Q. To make his stability better?

A. Yes.

Q. You spoke of a tender ship being hit with waves and wind and heeling over, and then hit again and maybe the cargo shifting and finally capsizing.

(Deposition of Toru Yamaguchi.)

A. Yes.

Q. That is an extreme case?

A. Yes.

Q. And when she encounters very bad weather?

A. Yes.

Q. And is loaded so that it is not safe to leave port with her?

A. No.

Q. Now, about the hand steering gear again. You say it is hard to connect it in the sea way.

A. Yes.

Q. It can be done, though, can't it?

A. Yes, it can be done.

Q. About how long does it take in the sea way?

A. Depending upon the conditions of the place, it can be fixed in about a half hour, but in a worse case it takes many hours.

Q. And you cannot steer very well with it after it is fixed?

A. No.

Q. Why do you have it at all?

A. How do you mean?

Q. What is the use of that steering gear? Apparently it is not of much value.

A. It is better than nothing, anyhow.

Q. That is the only reason?

A. That is the only reason, yes. Of course you can steer with it in smooth weather.

Q. And in the sea way, only not so easily, isn't that it?

(Deposition of Toru Yamaguchi.)

A. Yes.

Q. Do you know what the name of this ship was before your company bought her?

A. Yes—Alleghany; named from the mountains in the east.

Q. Who owned her?

A. Furness, Withey & Company.

Q. When did your company buy her, if you know?

A. In November, 1912.

Q. Do you know her dimensions?

A. I have it as, length—

Q. 354 feet?

A. Yes.

Q. Her beam 50 feet, 3 inches?

A. Yes.

Q. And depth?

A. Thirty feet, six inches.

Q. I have it 28.2.

A. Well, that may be true.

Q. Her tonnage is, gross 4354?

A. I think so.

Q. And net, 2740?

A. Yes.

Q. Now, for a ship of that general size, do you know what would ordinarily be a full cargo of lumber on deck?

A. Of such a type and size?

Q. And how much would such a ship ordinarily be expected to carry on deck, lumber?

(Deposition of Toru Yamaguchi.)

A. I could not tell.

Q. You do not know that?

A. No.

Q. The reason I ask is that I have a list of ships of somewhat similar size, a little longer, some of them, and I will give the names. The Strathearn, she carried from Port Townsend 799,000 feet on deck. Now, I am not putting in this as testimony at this time. The Strathdene, from Portland, carried over a million feet on deck. The Strathgyle carried more than a million; the Strathplane carried more than a million; the Strathtay carried more than a million; the Somedono Maru, a bigger ship, 400 feet long, carried more than a million feet too.

A. But what was the bunker condition?

Q. I do not know that.

A. That is an important thing. If she had no deck load of coal in bunker, she could carry some 700 thousand.

Q. How much more?

A. Something like 500 tons.

Q. Now, you say if the "Saigon" had not carried coal on deck?

A. Yes.

Q. How much total deck load could she carry, of lumber?

A. Well, about that amount, 733 tons.

Q. In weight?

A. Yes, in weight. May I see the list?

(Deposition of Toru Yamaguchi.)

Q. Yes.

A. One thing about the ships on the list; it shows more beam in comparison to the depth, and broader ships are more stiff.

Q. The point is, that on looking at the list, you call attention to the fact that the beam on those ships is more in proportion to the depth than on the "Saigon."

A. Yes, that is it; and that means that they are stiffer than the "Saigon." I think they are the most ideal type to carry lumber.

Q. That is, the Strath boats?

A. Yes. More metacentric height, and wide space.

Q. Only two feet wide deck space.

A. Oh, well, that is big enough; and the length is more, too. They are good deck load carriers.

RE-DIRECT EXAMINATION.

(By Mr. Huffer):

Q. If the coal that was used on deck had been put in the hold and the lumber had been put on deck instead, then when you consumed the coal from the hold, what effect would that have upon the stability of the vessel?

A. That would make it worse.

Q. The coal would some time be consumed but the lumber would always remain on deck?

A. Yes.

(Deposition of Toru Yamaguchi.)

Q. Now about the weight of cotton. In this cotton cargo from Bombay, how much weight of cotton did you have loaded in the hold of the vessel?

A. About four thousand tons weight.

Q. You spoke of some of your tanks on the Alps Maru and other vessels having longitudinal sections, that is, solid.

A. Yes, sir.

Q. And others with communicating spaces or holes.

A. Yes.

Q. Now are these tanks that have the communicating holes, the fresh water tanks or the salt water tanks?

A. Both. Well, we could use it both ways.

Q. Now as you go across, if you consumed say one-half of the fresh water in a tank, it is impracticable to fill it up with salt water.

Mr. Wood: That is objected to as leading.

A. Yes; we should lose the fresh water, but we could do it.

Q. Referring to the matter of lashing the lumber; explain why if lumber is piled high, with stanchions on each side and with lashings, why the cargo cannot be prevented from moving from one side to the other.

A. Because it has no support at the head of the stanchion.

Q. That is, if you have a stanchion on one side of the ship and one on the other, and lashings

(Deposition of Toru Yamaguchi.)

passing from the stanchion on one side to the stanchion on the other, then the tops of the stanchions—are they fixed or loose?

A. If it were put against something on the outside it could be fixed.

Q. But with a stick up there seven or nine or ten feet, they could not be put against or fastened to anything?

A. No.

Q. So that when the lashing passes from one side to the other, from one stanchion to the other on opposite sides, then what will happen in case of lurching or heeling of the vessel?

A. That sag would occur; the lashing would become loose by the strain.

Q. But suppose in case of a heavy roll of the vessel.

A. That would cause the lashing to become loose by straining and shifting the whole part one way or the other.

Q. That is, both stanchions would move in the same direction?

A. Yes, in the same direction.

Q. And the lashing of one to the other would not hold them?

A. No.

Q. Because neither has anything to fasten it?

A. Yes.

Mr. Wood: Let me ask; I think it will save time.

(Deposition of Toru Yamaguchi.)

Q. You mean that because the lashing goes from the top of one to the top of the other, they both move together?

A. Yes.

Q. So that they would not brace each other?

A. Yes.

Mr. Huffer: Did you have any experience on the Japanese coast in carrying deck load lumber or logs?

A. Yes, sir.

Q. How much did you carry on deck?

A. I put lumber in the space of the deck bunker. I think it took about four hundred tons.

Mr. Wood: I object to that.

Mr. Huffer: I withdraw it. That's all.

(Witness excused.)

UNITED STATES OF AMERICA, Western District of Washington, Southern Division, County of Pierce, State of Washington.	}	ss.
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I hereby certify that in pursuance of the stipulation of counsel dated March 26, 1918, and hereby annexed, on Tuesday, the 26th day of March, 1918, at the hour of 9 o'clock A. M. of said day, before me, Chas. D. Savery a notary public in and for the State of Washington, residing at Tacoma in said state and the notary mentioned in said stipulation, at the law office of Huffer & Hayden,

(Deposition of Toru Yamaguchi.)

Room 410 Fidelity Building, in the city of Tacoma, county of Pierce, State of Washington, personally appeared Toru Yamaguchi, the witness named in said stipulation and called on behalf of the claimant in that certain cause pending in the District Court of the United States for the District of Oregon, entitled "Pacific Export Lumber Company, a corporation, libelant, v. The Japanese Steamer 'Saigon Maru,' her tackle, apparel, etc., respondent, Osaka Shosen Kaisha, claimant," and numbered 7467,—Mr. Erskine Wood, Esq., of Portland, Oregon, appearing as proctor for said libelant, and F. A. Huffer, Esq., of Tacoma, Washington, appearing as proctor for said claimant; and the said witness Toru Yamaguchi, having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in said cause, and carefully examined, then and there deposed and said as appears by his deposition hereto annexed.

I further certify that said deposition was by consent of counsel of the parties, by me personally then and there taken down in shorthand notes and thereafter reduced to typewriting; that the reading of said deposition by or to said witness and the signing and subscription of the same by him were waived by counsel for both the libelant and claimant.

And I further certify that I have retained the said deposition in my possession for the purpose of mailing same with my own hands to the Clerk of the United States District Court for the Dis-

(Deposition of Toru Yamaguchi.)

trict of Oregon, the court for which the same was taken.

And I do further certify that I am not of counsel or attorney to either of the parties to said cause nor interested in the event of said cause.

In witness whereof I have hereunto set my hand and affixed my official seal at Tacoma, Pierce County, Washington, this 8th day of April, 1918.

[Notary's Seal.]

CHAS. D. SAVERY,

Notary Public in and for the State of Washington, residing at Tacoma, Pierce County in said state.

Notary and stenographer fees paid by claimant, \$21.00.

U. S. District Court, District of Oregon.

Filed April 10, 1918, G. H. Marsh, Clerk.

DEPOSITION OF F. KAWAMOTO, a witness for
Claimant.

STIPULATION TO TAKE DEPOSITION OF F.
KAWAMOTO.

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

STIPULATION TO TAKE DEPOSITION OF F.
KAWAMOTO.

PACIFIC EXPORT LUMBER COMPANY, a cor-
poration, Libelant,

v.

THE JAPANESE STEAMER "SAIGON MARU,"
her tackle, apparel, etc., Respondent,

OSAKA SHOSEN KAISHA, a corporation organ-
ized and existing under the laws of Japan,
Claimant.

It is stipulated by and between Pacific Export Lumber Company, a corporation, the above named libelant, and the Osaka Shosen Kaisha, a corporation, the above named claimant, through their respective proctors, that the deposition of F. Kawamoto, a witness for claimant, may be taken at Nagasaki, Japan, or at any other place, upon the interrogatories and cross-interrogatories hereto annexed, by virtue of this stipulation, and without commission or other authority or power, and

(Deposition of F. Kawamoto.)

without notice, before any consul-general, consul, vice-consul, or deputy consul appointed by the government of the United States, at such time as such consular officers may fix; and the taking of said deposition may be adjourned from time to time to suit the convenience of such officer and said witness. The certificate and seal of such officer shall be sufficient proof of his name, signature, and official character without other or further authentication or proof; and any and all preliminaries to the taking of such deposition required by law or rule of court are hereby dispensed with and any and all objections to the authority, power or capacity of such officer to take said deposition are hereby waived.

Said deposition, when taken, shall be mailed by such consular officer to the Clerk of the above entitled court at Portland, Oregon, and may be read in evidence by either party subject only to the objections (to be taken at the time the same are read in evidence) as to the competency, materiality or relevancy of the testimony therein set forth, and all other objections are hereby waived.

Dated this 12th day of December, 1917.

ERSKINE WOOD,
Of Proctors for said Libellant.
F. A. HUFFER,
W. H. HAYDEN,
HUFFER & HAYDEN,
Proctors for said Claimant.

(Deposition of F. Kawamoto.)

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a corporation, Libelant,

v.

THE JAPANESE STEAMER "SAIGON MARU,"
her tackle, apparel, etc., Respondent,

OSAKA SHOSEN KAISHA, a corporation organized and existing under the laws of Japan,
Claimant.

Interrogatories to be propounded to F. Kawamoto, a witness on behalf of the Claimant in the action wherein the Pacific Export Lumber Company is Libelant, the Japanese Steamer "Saigon Maru," her tackle, apparel, etc., is Respondent, and the Osaka Shosen Kaisha, a corporation, is Claimant.

FIRST INTERROGATORY.

What is your name, age, residence and occupation?

SECOND INTERROGATORY.

Where did you reside, and what was your occupation, during the first half of July, 1917, and what position, if any did you then hold, and what were your duties in such position?

THIRD INTERROGATORY.

If, in answer to the second interrogatory, you

(Deposition of F. Kawamoto.)

have stated what your occupation was in the first half of July, 1917, and what position you then held and the duties thereof, please state how long you have held said position and performed such duties.

FOURTH INTERROGATORY.

Are you acquainted with the S. S. "Saigon Maru," Japanese vessel of the Osaka Shosen Kaisha, the respondent in the above entitled cause; if so, please state what opportunities you have had for getting acquainted with said vessel.

FIFTH INTERROGATORY.

Have you had any experience in the business of seafaring and shipping, or in either of said businesses; if so, please state in detail the nature and extent of such experience, with the dates, duration, place and character of such experience.

SIXTH INTERROGATORY.

Have you had any experience in navigating, or assisting in, or observing the navigation of freight carrying steam vessels over any part of the route usually traveled by such vessels, when sailing from Japan to Bombay, India; if so, please state, in detail, the nature and extent of such experience.

SEVENTH INTERROGATORY.

Have you had any experience in the matter of loading, or determining, or deciding on the

(Deposition of F. Kawamoto.)

proper and safe method of loading freight carrying steam vessels of the approximate size and general type of the S. S. "Saigon Maru" when bound from Japan to Bombay, India, or other points in the Indian Ocean; if so, please state, in detail, the nature and extent of such experience.

EIGHTH INTERROGATORY.

Have you had any experience in the matter of loading, superintending the loading, or deciding upon the proper and safe manner of loading vessels of the approximate size and general type of the S. S. "Saigon Maru," especially when carrying deck loads of lumber, or other deck loads, when bound from Japan to Bombay, India, or other points in the Indian Ocean; if so, please state, in detail, the nature and extent of your experience.

NINTH INTERROGATORY.

Have you had any experience in navigating, or in assisting in, or observing the navigation of vessels of the approximate size and general type of the S. S. "Saigon Maru," bound from Japan to Bombay; India, or other points in the Indian Ocean; if so, please state the nature and extent of your experience in such navigation, and describe fully your opportunities for observing such navigation by others.

TENTH INTERROGATORY.

Have you had any experience in navigating,

(Deposition of F. Kawamoto.)

or in assisting in, or observing the navigation by others of vessels of the approximate size and general type of the S. S. "Saigon Maru," laden with cargo, including lumber cargo on deck, sailing from Japan in the summer time for Bombay, India, or other points in the Indian Ocean?

ELEVENTH INTERROGATORY.

Did you, in the month of July, 1917, examine or survey the said S. S. "Saigon Maru"; if so, please state at whose request and for what purpose you examined or surveyed the same, and give the date and place of said examination, and the object and purpose of making the same.

TWELFTH INTERROGATORY.

If you have answered that you made a survey of said vessel, and have given the date and place thereof, did you give any certificate of such survey; and if so, please attach said certificate to your answer to this interrogatory, and mark the same for identification.

THIRTEENTH INTERROGATORY.

If you have answered that in the first half of July, 1917, you made an examination or survey of said vessel, and have given the place and date of such examination, please state what cargo, if any, was laden on said vessel, and particularly what cargo, if any, was laden on the deck of said vessel.

(Deposition of F. Kawamoto.)

FOURTEENTH INTERROGATORY.

If you have answered that you examined said vessel in the early part of July, and have given the date and place of such examination, have you any opinion based upon facts within your knowledge as to what, if any, amount of lumber, in addition to that already laden on the deck of said vessel at the time of such examination, could, consistently with the safety of said vessel, its cargo and crew, and without rendering said vessel unseaworthy, have been laden and carried on the deck of said vessel, considering the nature and amount of the rest of the cargo then thereon and assuming that said vessel was then about to sail from said place of examination for Bombay, India; if so, please state the facts within your knowledge upon which such opinion is based, and then state what such opinion is.

FIFTEENTH INTERROGATORY.

If you have answered that you examined said vessel in the early part of July and have given the date and place of such examination, have you any opinion based upon facts within your knowledge as to what, if any, amount of lumber, in addition to that already laden on the deck of said vessel at the time of such examination, could, consistently with the safety of said vessel, its cargo and crew, and without rendering said vessel unseaworthy, have been laden on the deck of said vessel on a voy-

(Deposition of F. Kawamoto.)

age from Portland, Oregon, to Bombay, India, considering the nature and amount of the rest of the cargo then thereon, and assuming that said vessel sailed from Portland, Oregon, in the first part of June on a voyage to Bombay, India; if so, please state the facts within your knowledge upon which such opinion is based, and then state what said opinion is.

SIXTEENTH INTERROGATORY.

If you have testified that you examined the S. S. "Saigon Maru," in the early part of July, 1917, and have given the date and place of such examination, state whether, in your opinion, any amount of lumber, in addition to that already on the deck of said vessel, could, consistently with the safety of said vessel, its cargo and crew, have been laden on the deck of said vessel, considering the nature and the amount of the rest of the cargo then thereon, and assuming that said vessel was then about to sail from said place of examination to Bombay, India, and give in detail the reasons for your opinion.

SEVENTEENTH INTERROGATORY.

If, in answer to the fifteenth interrogatory, you have given it as your opinion that some quantity of lumber in addition to that already on the deck of said vessel, at the time and place of the examination by you mentioned in said interrogatory, could, consistently with the safety of said vessel, its car-

(Deposition of F. Kawamoto.)

go and crew, have been laden on said vessel under the circumstances stated in said interrogatory, what, in your opinion, is the maximum additional amount of lumber that could have been so laden and carried by said deck on said voyage, consistently with such safety and seaworthiness, and state fully the reasons for your opinion.

EIGHTEENTH INTERROGATORY.

Do you know of any rule or rules which are recognized in the seafaring business, governing the stowage and distribution of cargo, relatively to the weights of the different parts thereof, in vessels of the size and construction of the S. S. "Saigon Maru"; if so, please state what this rule, or these rules are, and apply them to the question of determining the proper deck load of lumber of the kind in question for the S. S. "Saigon Maru" upon the contemplated voyage from Portland, Oregon, to Bombay, India.

HUFFER & HAYDEN,
Proctors for Claimant.

DEPOSITION of F. KAWAMOTO, a witness on behalf of the Claimant in the action wherein the Pacific Export Lumber Company is Libellant, The Japanese Steamer "Saigon Maru," her tackle, apparel, etc., is Respondent, and the Osaka Shosen Kaisha, a corporation, is Claimant.

(Deposition of F. Kawamoto.)

Taken at the American consulate, at Kobe, Japan, on the twenty-third day of January, 1918.

IN ANSWER TO THE FIRST INTERROGATORY, DEPONENT STATED:

My name is Kawamoto Fudesuke.

I am 57 years of age.

I reside at Higashi Hon-machi 2 chome, Moji, Japan.

My occupation is that of marine surveyor and salvage contractor.

IN ANSWER TO THE SECOND INTERROGATORY, DEPONENT STATED:

During the first half of July, 1917, I resided at Moji, at the address given in answer to the first interrogatory and my occupation was that of marine surveying and salvage work. I held a certificate as master of the first grade and was a partner in the firm of Moji Kaiji Shokai (Moji Marine Company), engaged in marine surveying and salvage work. This firm acts as marine surveyors for Lloyd's agents and my duties were to attend to the marine surveying and surveying of shipping casualties for my firm.

IN ANSWER TO THIRD INTERROGATORY, DEPONENT STATED:

I have been a partner in the Moji Kaiji Shokai for 10 years, but I had made marine surveys for eight years before my entry into that firm. I have

(Deposition of F. Kawamoto.)

made marine surveys for Lloyd's for the past two years and have engaged in salvage work since I joined the Moji Kaiji Shokai.

IN ANSWER TO THE FOURTH INTERROGATORY, DEPONENT STATED:

I have often been on board the S. S. "Saigon Maru" of the Osaka Shosen Kaisha, for the purpose of making hatch surveys and bottom surveys.

IN ANSWER TO THE FIFTH INTERROGATORY, DEPONENT STATED:

I was a seafaring man for 15 years, from 1882 to 1897, during which period I have been a seaman, petty officer, officer and captain. I held a master's certificate for the last seven years of that period, from 1890 to 1897, and served as master on the bark "Kumasaka Maru," the S. S. "Hideyoshi Maru," the S. S. "Chikushi Maru," the S. S. "Atagosan Maru," the S. S. "Hikosan Maru," and on various other vessels plying between Japan and ports on the China coast. It is impossible for me, without reference to my records, which are in Moji, to give the names of all the vessels upon which I have served in various capacities, or the dates of such service. During the past 18 years I have been engaged in marine surveying and salvage work, but during this period I sometimes took temporary command of various vessels, such as the S. S. "Shakano Maru," the S. S. "Yoshino Maru," the S. S.

(Deposition of F. Kawamoto.)

"Manju Maru," the S. S. "Kanju Maru," and the S. S. "Hinode Maru," making voyages from Japan to Tientsin, Shanghai, Newchang, Cheefoo, Hong Kong and other Chinese ports.

IN ANSWER TO THE SIXTH INTERROGATORY, DEPONENT STATED:

I have navigated and assisted in navigating freight-carrying steam vessels over the Japan-Bombay route as far as Hong Kong, China. I cannot, without referring to my records, give an accurate account of the number of such voyages I have made, nor the dates thereof, but I know I must have made ten such voyages or more.

IN ANSWER TO THE SEVENTH INTERROGATORY, DEPONENT STATED:

I have had no direct personal experience of loading steamers bound from Japan to Bombay, India, or to other points in the Indian Ocean, but as chief officer and captain of freight-carrying steamers such as the "Shakano Maru" and the "Hikoson Maru," which are of the approximate size and general type of the S. S. "Saigon Maru," I have had much experience in the proper and safe methods of loading and stowage of cargo of all varieties, for voyages to the Chinese coast. Moreover, I have frequently made hatch surveys of cargo vessels running between Japan and Bombay, India, and from that experience I have been able to ob-

(Deposition of F. Kawamoto.)

serve the methods employed in loading vessels for that run.

IN ANSWER TO THE EIGHTH INTERROGATORY, DEPONENT STATED:

As stated in my answer to the seventh interrogatory, I have had no direct personal experience in actually loading vessels for the run from Japan to Bombay, India, or other points in the Indian Ocean, but during my long experience on the Japan-China run I have often carried deck loads of lumber and I can most confidently state that I have a thorough knowledge of the proper and safe methods of loading vessels carrying deck loads of lumber or other cargo.

IN ANSWER TO THE NINTH INTERROGATORY, DEPONENT STATED:

I have had no personal experience in navigating or assisting in navigating any vessel from Japan to Bombay, India, or to other points in the Indian Ocean, but I have often made hatch surveys of vessels of approximately the same size and general type as the S. S. "Saigon Maru" and from my experience in this work I have gained a thorough knowledge of the conditions of the voyage to the Indian Ocean. In making a hatch survey, I always first examine the log book and in this way I have become well acquainted with conditions prevailing on the Japan-India run.

(Deposition of F. Kawamoto.)

IN ANSWER TO THE TENTH INTERROGATORY, DEPONENT STATED:

I have never navigated nor assisted in navigating nor actually observed the navigation by others of steamers of any size or type carrying a deck cargo of lumber to Bombay, India, or to other points in the Indian Ocean, in the summer time. Moreover, I have seldom seen vessels carry deck cargoes of lumber to Bombay, India, or other points in the Indian Ocean, in the summer time.

IN ANSWER TO THE ELEVENTH INTERROGATORY, DEPONENT STATED:

Yes. I made a hatch survey of the S. S. "Saigon Maru" at the request of the Osaka Shosen Kaisha at Nagasaki, on July 3rd, 1917. I do not know the object of the Osaka Shosen Kaisha in requesting this survey to be made.

IN ANSWER TO THE TWELFTH INTERROGATORY, DEPONENT STATED:

Yes. A copy of my survey report is presented herewith.

(Copy of survey report attached to this deposition and marked "Exhibit A.")

IN ANSWER TO THE THIRTEENTH INTERROGATORY, DEPONENT STATED:

The S. S. "Saigon Maru" carried a full cargo of lumber. The lumber was piled on both the forward

(Deposition of F. Kawamoto.)

and after decks, to a depth of 6 feet 7 inches on the forward deck and to a depth of 4 feet 6 inches on the after deck, above the main deck.

IN ANSWER TO THE FOURTEENTH INTER-
ROGATORY, DEPONENT STATED:

When I made the hatch survey of the S. S. "Saigon Maru" at Nagasaki, on July 3, 1917, I noticed that, although the sea was smooth, the wind and tide were opposed to each other, causing the vessel to heel over easily to port and starboard about 7 degrees. The ballast tanks were filled but the engineer stated that the unusual rolling might be caused by the lack of water in the feed tank under the engine room, there being only about 10 inches of water in the tank, which had a depth of more than three feet. My observations lead me to believe that the stability of the vessel at the time was bad, but I cannot state whether this was due to a fault in the vessel herself or to the manner of loading. Moreover, I noticed that the steering rod was so arranged in this vessel as to pass over the bulwarks, at a height of about seven feet above the deck. The stanchions, also, were sometimes securely fastened to the bulwarks, extending down nearly to the deck, but others were fastened only at the top of the bulwark.

Considering the stability of the vessel, it is my opinion that the addition of any more deck cargo might have resulted in making the vessel

(Deposition of F. Kawamoto.)

top-heavy and unseaworthy. Moreover, if the lumber had been piled to a greater height on the deck, it would have been difficult to lash it securely, as the amount above the bulwarks could not have been secured so that it would not be likely to shift in a heavy sea. If the cargo had been piled higher than the bulwarks on the after deck, it might have shifted or broken loose in a rough sea and damaged or obstructed the steering rods, rendering the vessel unmanageable. If such cargo shifted, the stanchions supporting the steering rods could easily have been broken or bent so as to interfere with the steering gear.

Therefore, it is my opinion that the vessel could not have carried, in addition to the lumber already laden, any more deck cargo.

IN ANSWER TO THE FIFTEENTH INTERROGATORY, DEPONENT STATED:

Assuming that the vessel in question sailed from Portland, Oregon, for Bombay, India, in the first part of June, no more deck cargo, other than what was already laden, could have been carried, consistently with the safety of the vessel and its cargo and crew, because the China Sea, on the route of a steamer bound to Bombay, is frequently visited, during this season of the year, by terrible typhoons. Moreover, it is the roughest season of the year in the Indian Ocean and Bay of Bengal and a steamer bound to Bombay exposes her beam to

(Deposition of F. Kawamoto.)

the heavy seas. Consequently it is dangerous to navigate such a sea carrying much deck cargo.

IN ANSWER TO THE SIXTEENTH INTERROGATORY, DEPONENT STATED:

Assuming that the voyage in question was to be between Japan and Bombay, it is my opinion that it would have been impossible to have carried any larger cargo of lumber on the deck of the S. S. "Saigon Maru" than what was already laden thereon, for the reason which I have given in my answer to the fifteenth interrogatory.

IN ANSWER TO THE SEVENTEENTH INTERROGATORY, DEPONENT STATED:

I deem it unnecessary to answer this interrogatory, in view of my answers to the two interrogatories immediately preceding, as I consider it impossible to have carried any larger load than already laden.

IN ANSWER TO THE EIGHTEENTH INTERROGATORY, DEPONENT STATED:

Rules as to cargo differ according to the cargo. There are no rules or even customs regarding the loading of lumber in Japan, but there is a custom among Japanese seafaring men that not more than 10 per cent of any cargo should be carried on deck. Nevertheless, I estimated that the deck cargo of the S. S. "Saigon Maru," at the time when I made the hatch survey at Nagasaki on July 3, 1917,

(Deposition of F. Kawamoto.)

was slightly in excess of 10 per cent of the whole cargo.

If I remember correctly, there is a law in England and Canada to the effect that a deck cargo of lumber shall not exceed 3 feet in depth during the winter season. Considering the spirit of this law, the winter season must be taken to mean the season when the sea is most rough, and as the sea of the Indian Ocean is most rough in summer, as that of English and Canadian waters is most rough in winter, looking at the question from this standpoint as well as from my many years experience as a seafaring man, I think that the deck cargo of lumber carried on the S. S. "Saigon Maru" on the voyage in question was the maximum amount allowable under the circumstances.

F. KAWAMOTO.

(Sgd.) E. R. DICKOVER,
American Vice-Consul.

EXHIBIT A.

CERTIFICATE.

I hereby certify having, at the request of Messrs. Holme, Ringer & Co., Lloyd's agents, and on behalf of Messrs. The Osaka Shosen Kaisha, surveyed the deck cargo loaded per S. S. "Saigon Maru" of 4,354.01 tons gross, Y. Yamamoto, master, whilst lying in Nagasaki on the 3rd day of July, 1917. The vessel was on a voyage from Portland, Ore., to

(Deposition of F. Kawamoto.)

Bombay with a full cargo of lumber some 5691 tons.

I found the lumber stowed on the fore deck to the height of 6 feet 7 inches and on the after deck to the height of 4 feet 6 inches, both measurements being taken from the main deck. I estimate this deck load, including cargo stowed in poop, to be about 578 tons or, say, a little over 10% of the total cargo on board and this I consider to be in every way ample, consistent with the safety of the steamer.

Survey FeeYen 100.00

Traveling Expenses .. “ 20.00

Yen 120.00

F. KAWAMOTO,
Marine Surveyor.

Nagasaki, 3rd July, 1917.

We, the undersigned, Lloyd's Agents, hereby certify that we appointed Captain Kawamoto to conduct the above survey and we belief full confidence may be placed in his report.

HOLME, RINGER, & CO.,

Nagasaki, 7th July, 1917.

Lloyd's Agents.

Fee for Certificate—Yen 10.00

Seal

HOLME, RINGER & CO.,

Signed in Triplicate.

Lloyd's Agents,

Nagasaki, Japan.

(Deposition of F. Kawamoto.)

CERTIFICATE OF E. R. DICKOVER, AMERICAN VICE-CONSUL, ATTACHED TO DEPOSITION OF F. KAWAMOTO.

In the District Court of the United States for the District of Oregon.

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a corporation, Libelant,

v.

THE JAPANESE STEAMER "SAIGON MARU," her tackle, apparel, etc., Respondent,

OSAKA SHOSEN KAISHA, a corporation organized and existing under the laws of Japan, Claimant.

EMPIRE OF JAPAN, HYOGO PREFECTURE, }
American Consulate } ss.

I, Erle R. Dickover, the duly appointed and acting United States Vice Consul, at Kobe, Japan, duly authorized under and by virtue of the Acts of Congress of the United States and of the Revised Statutes of the United States to take depositions in causes depending in the Courts of the United States, do hereby certify that pursuant to the attached stipulation, I was requested to and did proceed with the taking of the deposition of F. Kawamoto; that said F. Kawamoto appeared before me on the 23rd day of January, 1918, as a witness in the above entitled action on behalf of the claimants, and was of

(Deposition of F. Kawamoto.)

sound mind and lawful age, and was by me first carefully examined, cautioned and sworn to testify the truth, the whole truth and nothing but the truth, that forthwith thereafter the interrogatories attached to said stipulation were propounded by me to the said F. Kawamoto, and the answers of said F. Kawamoto were reduced to writing by myself at the American consulate at Kobe, Japan, from the statements of said F. Kawamoto, and that after carefully reading the same to said witness, he subscribed the same in my presence; that I have retained the said deposition in my possession for the purpose of forwarding the same with my own hand to the Clerk of the United States District Court for the District of Oregon at Portland, Oregon, the court for which the same is taken, in a sealed envelope addressed to said Clerk, after having endorsed on the corner thereof the following: "Deposition of F. Kawamoto, a witness for claimant in action by Pacific Export Lumber Co. vs. S. S. 'Saigon Maru', No. 7467." I do hereby further certify that I am not counsel nor attorney for either of the parties in said deposition or caption named, nor in any way interested in the event of the cause named in said caption.

In testimony whereof, I have hereunto set my

(Deposition of F. Kawamoto.)

hand and seal this 30th day of January, in the year
of our Lord, 1918.

E. R. DICKOVER,

Vice Consul of the United
States of America at Kobe,
Japan.

(Seal of American Consulate, Kobe, Japan.)

Filed February 25, 1918. G. H. Marsh, Clerk,
By F. L. Buck, Deputy.

DEPOSITION OF Y. YANO, A WITNESS FOR
CLAIMANT.

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a cor-
poration,

Libelant,

vs.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.,

Respondents.

OSAKA SHOSEN KAISHA, a corporation organ-
ized and existing under the laws of Japan,
Claimant.

(Deposition of Y. Yano.)

STIPULATION TO TAKE DEPOSITION OF Y.
YANO.

It is stipulated by and between Pacific Export Lumber Company, a corporation, the above named libelant, and the Osaka Shosen Kaisha, a corporation, the above named claimant, through their respective proctors, that the deposition of Y. Yano, a witness for claimant, may be taken at Kobe, Japan, or at any other place, upon the interrogatories and cross interrogatories hereto annexed, by virtue of this stipulation, and without commission or other authority or power, and without notice, before any consul-general, consul, vice-consul, or deputy consul appointed by the government of the United States, at such time as such consular officer may fix; and the taking of said deposition may be adjourned from time to time to suit the convenience of such officer and said witness. The certificate and seal of such officer shall be sufficient proof of his name, signature and official character without other or further authentication or proof; and any and all preliminaries to the taking of such deposition required by law or rule of court are hereby dispensed with and any and all objections to the authority, power or capacity of such officer to take said deposition are hereby waived.

Said deposition, when taken, shall be mailed by such consular officer to the Clerk of the above entitled court at Portland, Oregon, and may be read in

(Deposition of Y. Yano.)

evidence by either party subject only to the objections (to be taken at the time the same are read in evidence) as to the competency, materiality or relevancy of the testimony therein set forth, and all other objections are hereby waived.

Dated this 12th day of December, 1917.

ERSKINE WOOD,

Of Attorneys for Said Libelant.

F. A. HUFFER,

W. H. HAYDEN,

HUFFER & HAYDEN,

Attorneys for Said Claimant.

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libelant,

vs.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.,

Respondents.

OSAKA SHOSEN KAISHA, a corporation organized and existing under the laws of Japan,

Claimant.

Interrogatories to be propounded to Y. Yano, a witness on behalf of the claimant in the action wherein the Pacific Export Lumber Company is

• (Deposition of Y. Yano.)

libelant, The Japanese Steamer "Saigon Maru", her tackle, apparel, etc., is respondent, and the Osaka Shosen Kaisha, a corporation, is claimant.

FIRST INTERROGATORY.

What is your name, your age, residence and occupation?

SECOND INTERROGATORY.

With whom and in what capacity are you now employed, and with whom and in what capacity were you employed in the months of May and June, 1917?

THIRD INTERROGATORY.

Have you had any experience in the seafaring and shipping business, and, if so, please state in detail what this experience has been, and the positions, if any, you have held, and the duties, if any, you have performed in such business.

FOURTH INTERROGATORY.

Are you acquainted with the S. S. "Saigon Maru", the respondent in the above entitled cause, and if so, please state what opportunities you have had to become acquainted with said vessel.

FIFTH INTERROGATORY.

Do you know the route usually traveled by freight carrying steam vessels plying between the northwest coast of the United States and Bombay, India; if so, please describe such route in detail.

(Deposition of Y. Yano.)

SIXTH INTERROGATORY.

Do you know the route usually traveled by freight carrying steam vessels plying between Japan and Bombay, India; if so, please describe such route in detail.

SEVENTH INTERROGATORY.

Do you know the route usually traveled by freight carrying steam vessels plying between Portland, Oregon, and Bombay, India; if so, please describe such route in detail.

EIGHTH INTERROGATORY.

What is the route usually traveled by freight carrying steam vessels of the approximate size and general type of the S. S. "Saigon Maru", sailing in the early part of June of any year from the northwest coast of the United States to Bombay, India?

NINTH INTERROGATORY.

Do you know what route was actually taken by the S. S. "Saigon Maru" after leaving Portland the early part of June, 1917, or any part of said route; if so, please state what that route was so far as the same is known to you.

TENTH INTERROGATORY.

Have you had any experience in navigating, or in assisting in or observing the navigation of freight carrying steam vessels over any part of the route usually traveled by such vessels plying between the northwest coast of the United States and Bombay,

(Deposition of Y. Yano.)

India; if so, please state over what part or parts of said route you have had such experience and opportunities for observation, and in detail, the nature, duration and extent of such experience and opportunities for observation.

ELEVENTH INTERROGATORY.

Have you had any experience in navigating, or in assisting in, or observing the navigation of freight carrying steam vessels of the approximate size and general type of the S. S. "Saigon Maru" over any part of the route usually traveled by such vessels plying between the northwest coast of the United States and Bombay, India; if so, please state over what part or parts of said route you have had such experience and opportunities for observation, and in detail, the nature, duration and extent of such experience and opportunities for observation.

TWELFTH INTERROGATORY.

Have you had any experience in navigating or in assisting in the navigation, or opportunities for observing the navigation of freight carrying steam vessels of the approximate size and general type of the S. S. "Saigon Maru" when laden with cargo and carrying a deck load of lumber, over any part of the route usually traveled by such vessels plying between the northwest coast of the United States and Bombay, India; if so, please state over what part or parts of said route you have had such experience or opportunities for observation, and the time, du-

(Deposition of Y. Yano.)

ration and extent of such experience and opportunities for observation.

THIRTEENTH INTERROGATORY.

Have you had any experience in loading, assisting in, supervising the loading, or deciding as to the proper method of loading cargo on freight carrying steam vessels of the approximate size and general type of the "Saigon Maru"; if so, please state the nature and extent of your experience, what vessels your experience related to, and over what waters such cargo was loaded to be carried on such vessels.

FOURTEENTH INTERROGATORY.

Do you know the character of the weather and seas to be encountered on the whole or any part of the voyage of freight carrying steam vessels plying between the northwest coast of the United States and Bombay, India, in case of vessels leaving the northwest coast of the United States in the forepart of June; if so, describe in detail the character of the wind and weather which would ordinarily be encountered, and also which may be encountered on such voyage, and its effect upon such a vessel, especially when carrying a deck load of lumber.

FIFTEENTH INTERROGATORY.

Were you in Portland, Oregon, the latter part of May and the first part of June, 1917, when the S. S. "Saigon Maru", above mentioned, was loading a cargo of lumber for Bombay, India; if so, did you have

(Deposition of Y. Yano.)

any duties to perform there in connection with said vessel and the cargo thereof, or either of them?

SIXTEENTH INTERROGATORY.

If you have answered the last above interrogatory in the affirmative, state what, if any, your duties were at the time and place mentioned in said interrogatory in connection with said vessel and said cargo, or either of them, and what, if anything, you then and there did in connection with said vessel and cargo, or either of them.

SEVENTEENTH INTERROGATORY.

Did you make an examination or examinations of the S. S. "Saigon Maru" in Portland, Oregon, the last part of May or the first part of June, 1917, and if so, state the number of such examinations, the time or times the same were made, and the purpose for which they were made.

EIGHTEENTH INTERROGATORY.

Did you know what cargo was aboard the said S. S. "Saigon Maru" when she sailed from Portland on or about the 5th day of June, 1917, and the condition of said vessel, and the manner in which it was loaded?

NINETEENTH INTERROGATORY.

Did you, at Portland, Oregon, on or about the 4th or 5th day of June, 1917, after all of the cargo, which was laden on said vessel when she left said city on her voyage to Bombay, India, had been laden thereon

(Deposition of Y. Yano.)

at said city, examine said vessel and the deck cargo thereon; and if so, for what purpose was such examination made?

TWENTIETH INTERROGATORY.

Did you make an examination of the S. S. "Saigon Maru" in Portland, Oregon, the last part of May or the first part of June, 1917; if so, please state at what time or times, and for what purpose such examination was made.

TWENTY-FIRST INTERROGATORY.

Did you, in the latter part of May or the first part of June, 1917, at Portland, Oregon, observe the "Saigon Maru" and its cargo, or any part thereof, in the course of the loading of said vessel there at said time; if so, please state to what extent and for what period of time you observed such loading, and when you last saw said vessel before it left Portland, Oregon.

TWENTY-SECOND INTERROGATORY.

Have you an opinion based upon facts within your knowledge as to the maximum quantity of lumber, which could, with safety and without rendering said vessel unseaworthy for said voyage, have been loaded on the deck of said vessel for its said contemplated voyage from Portland, Oregon, to Bombay, India, considering the character and amount of the cargo in the other parts of said vessel before she sailed on said voyage; if so, please state the facts

(Deposition of Y. Yano.)

within your knowledge upon which said opinion is based, and then state what said opinion is.

TWENTY-THIRD INTERROGATORY.

Have you an opinion, based upon facts within your knowledge, as to the maximum quantity of lumber of the kind, which was on the deck of said vessel before her departure on the contemplated voyage from Portland, Oregon, to Bombay, India, said vessel could carry on deck on said voyage with safety and without rendering said vessel unseaworthy; if so, please state the facts within your knowledge upon which said opinion is based, and then state what such opinion is.

TWENTY-FOURTH INTERROGATORY.

Have you an opinion, based upon facts within your knowledge, as to whether said vessel S. S. "Saigon Maru" could, consistently with the safety of said vessel, her cargo and crew, and without rendering said vessel unseaworthy, have carried on deck on the contemplated voyage of said vessel from Portland, Oregon, to Bombay, India, any lumber in addition to the lumber that was laden on the deck of said vessel at the time she sailed from said city upon said voyage; if so, please state the facts within your knowledge upon which said opinion is based, and then state whether or not, in your opinion, said vessel could, consistently with the safety of said vessel, its cargo and those aboard, and without rendering said vessel unseaworthy for said voyage, have car-

(Deposition of Y. Yano.)

ried on said voyage on the deck of said vessel any lumber in addition to the lumber that was already loaded on said deck at the time she sailed on said voyage.

TWENTY-FIFTH INTERROGATORY.

If, in answer to the twenty-fourth interrogatory, you have given it as your opinion that said S. S. "Saigon Maru" could, consistently with the safety of said vessel, her cargo and crew, and without rendering said vessel unseaworthy under the circumstances stated in said interrogatory, have carried on deck, on the voyage mentioned in said interrogatory, some quantity of lumber in addition to that already laden on said deck at the time she sailed from Portland, Oregon, on said voyage, what, in your opinion, is the maximum additional amount of lumber said vessel could, consistently with such safety and seaworthiness, have carried on deck on said voyage?

TWENTY-SIXTH INTERROGATORY.

Please state whether, in your opinion, any lumber, in addition to the lumber which was laden on said vessel "Saigon Maru" at the time of her departure from Portland, Oregon, about the 4th or 5th of June, 1917, could, consistently with the safety of said vessel, its cargo and the lives of those aboard, and without rendering said vessel unseaworthy, have been laden on the deck of said vessel and carried by it on said contemplated voyage from Portland, Oregon to Bombay, India, and, if any addi-

(Deposition of Y. Yano.)

tional lumber could have been so loaded and carried on said deck, what is the maximum quantity that could have been so loaded and carried, without endangering said vessel, its cargo, and the lives of those aboard, and without rendering said vessel unseaworthy?

TWENTY-SEVENTH INTERROGATORY.

Do you know of any rule or rules which are recognized in the seafaring business, governing the stowage and distribution of cargo, relatively to the weights of the different parts thereof, in vessels of the size and construction of the S. S. "Saigon Maru"; if so, please state what this rule, or these rules are, and apply them to the question of determining the proper deck load of lumber of the kind in question for the S. S. "Saigon Maru" upon the contemplated voyage from Portland, Oregon, to Bombay, India.

HAYDEN & HUFFER,

Proctors for Claimant.

DEPOSITION OF Y. YANO—A witness on behalf of the claimant in the action wherein the Pacific Export Lumber Company is libellant, the Japanese steamer "Saigon Maru," her tackle, apparel, etc., is respondent, and the Osaka Shosen Kaisha, a corporation, is claimant.

Taken at the American Consulate, at Kobe, Japan, on the twenty-fourth and twenty-fifth days of January, 1918.

(Deposition of Y. Yano.)

IN ANSWER TO THE FIRST INTERROGATORY
DEPONENT STATED:

My name is Yasujiro Yano.

I am 31 years and 11 months old.

My residence is at Hanakuma-cho, Kobe, Japan.

My occupation is that of steamship captain.

IN ANSWER TO THE SECOND INTERROGA-
TORY, DEPONENT STATED:

I am now employed by the Osaka Shosen Kaisha as a master of steamers. In the months of May and June, 1917, I was employed by the Osaka Shosen Kaisha as port captain attached to the local office at Tacoma, Washington.

IN ANSWER TO THE THIRD INTERROGA-
TORY, DEPONENT STATED:

I have had 13 years experience in the seafaring and shipping business, since my graduation from the Government Nautical College in Tokyo, Japan, in 1905, as third officer, second officer, first officer, captain and port captain, for the Osaka Shosen Kaisha. As third officer, second officer, first officer and captain I navigated and assisted in navigating the vessels upon which I was employed, supervised the loading of cargo, and performed the various other duties attached to my position. From January, 1916, until September, 1917, I was staying in the United States as port captain at Tacoma, Washington, for the Osaka Shosen Kaisha, and gave advice

(Deposition of Y. Yano.)

to the captains of company steamers as to the stowage of cargo. Since returning from America I have joined the company steamers again as master.

IN ANSWER TO THE FOURTH INTERROGATORY, DEPONENT STATED:

I am very well acquainted with the S. S. "Saigon Maru". About five years ago I was chief officer of a steamer which was running on the same line as the "Saigon Maru" and I often saw her in port and at sea. While I was staying at Tacoma I was supervising the stowage of cargo of the company steamers and consequently I carefully investigated this and other steamers. In May, 1917, the "Saigon Maru" came to Puget Sound and I went on board her for inspection on several occasions and also I went to Portland, Oregon, to perform my duties in connection with the said vessel when the vessel proceeded there in the latter part of May, 1917.

IN ANSWER TO THE FIFTH INTERROGATORY, DEPONENT STATED:

Yes, I know the route usually traveled between the northwest coast of the United States and Bombay, India. After leaving the northwest coast of the United States, freight-carrying steam vessels take the route to Inuboye or Kinkazan by the composite great circle sailing, and navigate westward in the parallels of 50 degrees to 51 degrees north latitude. In the winter season low-powered steamers take the parallels of from 48 degrees to 50 degrees north lati-

(Deposition of Y. Yano.)

tude, because in high latitudes we frequently met with furious weather. From Inuboye or Kinkazan the steamers proceed along the Pacific Coast of the Japan Islands to the southward and then they stop at one of the coaling ports of Japan for fuel. After leaving Japan, the steamers pass Formosa Strait and proceed through the China Sea, keeping close to the Anam coast, to Singapore. Then they proceed to Malacca Straits, reaching the north point of the island of Sumatra, then crossing the Bay of Bengal, they come to the southward of Ceylon. From there, going to the northward along the Mallaber coast, they arrive at Bombay.

IN ANSWER TO THE SIXTH INTERROGATORY, DEPONENT STATED:

Yes. I have described this route in detail in the latter part of my answer to the fifth interrogatory.

IN ANSWER TO THE SEVENTH INTERROGATORY, DEPONENT STATED:

Yes. But as Portland, Oregon, is on the northwest coast of the United States and the route from the northwest coast of the United States to Bombay, India, was described in detail in my answer to the fifth interrogatory, I do not consider it necessary to describe the route again.

IN ANSWER TO THE EIGHTH INTERROGATORY, DEPONENT STATED:

The early part of June, in the North Pacific

(Deposition of Y. Yano.)

Ocean, is the best and safest season for navigation for all steamers. So freight-carrying steam vessels, of the approximate size and general type of the S. S. "Saigon Maru", leaving the northwest coast of the United States, navigate by the composite great circle sailing to Kinkazan, proceeding on the parallels of 51 degrees north latitude, and then the same route is taken as described in my answer to the fifth interrogatory.

IN ANSWER TO THE NINTH INTERROGATORY, DEPONENT STATED:

Yes. I know the entire route taken by the S. S. "Saigon Maru" on the voyage in question. I have here the table of noon positions which show the exact route taken by the S. S. "Saigon Maru" on the voyage in question. (Table of noon positions attached hereto and labeled "Exhibit A.") The noon positions show that the route taken by the captain of the S. S. "Saigon Maru" corresponds very closely to the route described in my answer to the fifth interrogatory. This is the same route as that which I would have taken if I had been master of the "Saigon Maru" at the time.

IN ANSWER TO THE TENTH INTERROGATORY, DEPONENT STATED:

I have had much experience on the entire route between the northwest coast of the United States and Bombay, India. I was on board the S. S. "Indo Maru", as first officer, over one year, when the said

(Deposition of Y. Yano.)

vessel was running between Japan and Bombay. I was on board the S. S. "Annan Maru" as first officer one-half year, when she was running between Japan, Java and Rangoon, via Singapore, and also I made one trip from England to Japan by the S. S. "Annan Maru" as first officer through the Indian Ocean, Bay of Bengal and China Sea. Between Tacoma and Hong Kong, via Japan ports, I was three years on board the S. S. "Panama Maru," "Tacoma Maru" and "Hawaii Maru," as second and first officer. As second and first officer I assisted in navigating the vessels upon which I was stationed over all the routes described above.

IN ANSWER TO THE ELEVENTH INTERROGATORY, DEPONENT STATED:

Yes. The S. S. "Annan Maru" and "Indo Maru" are of the approximate size and general type of the S. S. "Saigon Maru". In the preceding interrogatory I described my experience on those vessels. Between Japan and the United States I have served on the S. S. "Panama Maru", "Tacoma Maru", and "Hawaii Maru", but these vessels are of larger size and more improved type than the S. S. "Saigon Maru".

IN ANSWER TO THE TWELFTH INTERROGATORY, DEPONENT STATED:

Yes. When I was on the S. S. "Indo Maru" I took lumber on deck from Japan to Singapore and also from Singapore to Bombay. In any season I did not carry a deck cargo of lumber more than 3 feet

(Deposition of Y. Yano.)

in height. In the southwest monsoon season I refused to carry any lumber on deck from Singapore to Bombay, for the safety of the vessel, and all seafaring men at Singapore agreed with my opinion that deck cargo should be refused during that season.

Crossing the Pacific Ocean from Tacoma to Japan I carried lumber on deck on many occasions, by the S. S. "Panama Maru", "Tacoma Maru" and "Hawaii Maru", not more than 4 feet in height on deck, but these steamers are of larger size and more improved type than the S. S. "Saigon Maru". I have had no experience in carrying lumber on deck in such quantity as that carried by the S. S. "Saigon Maru" on the voyage in question.

IN ANSWER TO THE THIRTEENTH INTER-
ROGATORY, DEPONENT STATED:

Yes. When I was on board the S. S. "Annan Maru" as first officer, I stowed cargo from Japan to Singapore and Rangoon and on board the "Indo Maru" from Japan to Bombay. I was on these steamers for two and one-half years. While I was in Tacoma as port captain for the Osaka Shosen Kaisha, I superintended the stowage of cargo on the following steamers: "Shimpo Maru", "Tosan Maru", "Shimbu Maru", "Shinkoku Maru", "Ide Maru", "Annan Maru", "Chosen Maru", "Nanking Maru", "Inaho Maru", "Mitsuki Maru", "Itsakushima Maru", "Luzon Maru", "Java Maru", "Kumi

(Deposition of Y. Yano.)

Maru", "Seiko Maru", "Kunajiri Maru", "Fukui Maru", "Taiyo Maru", "Burma Maru" and "Siam Maru". These steamers are all of the approximate size and general type of the S. S. "Saigon Maru", and were sent to Japan from Tacoma, Seattle and Vancouver.

IN ANSWER TO THE FOURTEENTH INTER-
ROGATORY, DEPONENT STATED:

In the North Pacific Ocean in the fore part of June the weather is rather safe for freight carrying steam vessels. There are westerly prevailing winds but not strong. In the China Sea steamers frequently encounter typhoons in July, at which time they would most likely arrive in the China Sea if leaving the northwest coast of the United States in June. In the Bay of Bengal and Indian Ocean this is the worst season of the year, there being strong monsoons and heavy seas. From Sumatra to Ceylon the steamers are exposed to the strong southwest monsoons and heavy sea. From Ceylon to Bombay steamers suffer from strong southwest monsoons on the port beam and heavy seas also. So if the steamers are laden with a large deck cargo of lumber and meet a typhoon in the China Sea, the effects sometimes are terrible and in the Indian Ocean strong monsoons and heavy seas inflict serious damage to steamers loaded in this way and it is sometimes very dangerous.

(Deposition of Y. Yano.)

IN ANSWER TO THE FIFTEENTH INTERROG-
ATORY, DEPONENT STATED:

Yes. I was in Portland, Oregon, during the latter part of May and the first part of June, 1917, and I had duties to perform there in connection with the said vessel and cargo.

IN ANSWER TO THE SIXTEENTH INTERROG-
ATORY, DEPONENT STATED:

I was sent to Portland, Oregon, as the representative of the Osaka Shosen Kaisha, when the S. S. "Saigon Maru" was in port, and as I was port captain I superintended the stowage of a cargo of lumber on the said steamer and attended to the stevedoring business. As the representative of my company, I also transacted all business connected with the chartering of the steamer.

IN ANSWER TO THE SEVENTEENTH INTER-
ROGATORY, DEPONENT STATED:

I examined the S. S. "Saigon Maru" at Portland, Oregon, on several occasions. I cannot tell the exact number of examinations I made, as I was on board the vessel continually, for the purpose of supervising the stowage of the cargo. Before the loading, I examined the said vessel in order to decide whether the vessel was ready or not to receive the cargo and to estimate the quantity of cargo which she could carry, and every evening, after loading of the cargo had ceased for that day, I examined the said vessel for the purpose of finding the remaining vacant spaces

(Deposition of Y. Yano.)

in the holds. After loading I examined the vessel for the purpose of ascertaining her seaworthiness and inspected the lashing of the deck cargo of lumber, especially on the after deck, as the steering rods passed above the bulwarks, and if the deck cargo of lumber was not lashed securely, it might shift and damage the steering rods.

IN ANSWER TO THE EIGHTEENTH INTER-
ROGATORY, DEPONENT STATED:

Yes. I know that the cargo of the said S. S. "Saigon Maru" when she sailed from Portland, Oregon, on or about the 5th day of June, 1917, was lumber, stowed on deck and below deck. All the holds and between-decks were completely filled with lumber and the deck cargo of lumber was stowed all over the decks and hatchways, except that there was no lumber on top of No. 4 hatchway. On the forward deck the lumber was piled up about 6 feet in height and on the after deck about 4 feet in height. The vessel appeared to be seaworthy and had proper stability. In the fresh water of the harbor of Portland, the vessel drew 24 feet and carried ample coal and water for the trip to Nagasaki, Japan. All ballast tanks were filled. All the deck cargo of lumber was lashed tightly with chains and wire, with wooden stanchions.

IN ANSWER TO THE NINETEENTH INTER-
ROGATORY, DEPONENT STATED:

Yes. I examined the S. S. "Saigon Maru" at

(Deposition of Y. Yano.)

Portland, Oregon, on the 4th day of June, 1917, after all of the cargo had been laden thereon, for the purpose of ascertaining the seaworthiness of the said steamer, taking into consideration the condition of the tanks, the amount of fuel, cargo and water, draught, etc. Especially I made a careful examination of the deck cargo of lumber and the steering gear. The purpose of my examination was to ascertain the seaworthiness of the vessel and I finally found everything in good order and sound condition.

IN ANSWER TO THE TWENTIETH INTERROGATORY, DEPONENT STATED:

I think it is unnecessary to answer this interrogatory, in view of my answer to the seventeenth interrogatory.

IN ANSWER TO THE TWENTY-FIRST INTERROGATORY, DEPONENT STATED:

I was on board the S. S. "Saigon Maru", at Portland, all the time while she was lying there, for the purpose of supervising the stowage of cargo. I last saw the said vessel on the night previous to her departure from Portland, Oregon.

IN ANSWER TO THE TWENTY-SECOND INTERROGATORY, DEPONENT STATED:

In general, 10% of the total amount of lumber laden on a vessel built for carrying general cargo, may be carried on the decks. This opinion was written by Captain Hillcoat in his "Notes on Stowage

(Deposition of Y. Yano.)

of Ships". In the case of the "Saigon Maru", she took 2,731,818 feet of lumber altogether, both on the decks and under deck. 277,677 feet of lumber were carried on deck; so it was slightly in excess of 10% of the whole amount of lumber laden on the vessel. From my long experience in the seafaring and shipping business, I believe that any additional amount of lumber on the fore deck of the said vessel, over 6 feet 7 inches in height, might have resulted in making the vessel unseaworthy, in the point of stability, and on the after deck, where the steering rods pass above the bulwarks, the deck cargo of lumber should not be piled more than 4 feet 6 inches in height, because if such cargo shifted only one inch in heavy weather at sea, the stanchions supporting the steering rods could easily have been broken or bent so as to interfere with the steering gear and render the vessel unmanageable. By the above-mentioned facts, it is my opinion that the amount of deck cargo of lumber which was loaded on said steamer at Portland, Oregon, was the maximum quantity which could be carried consistent with her safety, considering the route on the contemplated voyage and the weather and sea to be encountered.

IN ANSWER TO THE TWENTY-THIRD INTERROGATORY, DEPONENT STATED:

I have the same opinion as was described in my answer to the twenty-second interrogatory as to the maximum quantity of lumber of the kind which was

(Deposition of Y. Yano.)

loaded on the deck of the said vessel before her departure on the contemplated voyage from Portland, Oregon, to Bombay, India. I consider it was the maximum quantity for the said vessel.

IN ANSWER TO THE TWENTY-FOURTH INTERROGATORY, DEPONENT STATED:

I deem it unnecessary to answer this interrogatory, in view of my answers to the twenty-second and twenty-third interrogatories, as I consider it would have been impossible to load any more additional lumber than what was already laden on the decks of the S. S. "Saigon Maru" at the time of her departure from Portland, Oregon, on her contemplated voyage to Bombay, India.

IN ANSWER TO THE TWENTY-FIFTH INTERROGATORY, DEPONENT STATED:

In view of my answer to the twenty-fourth interrogatory, I deem it unnecessary to answer this interrogatory.

IN ANSWER TO THE TWENTY-SIXTH INTERROGATORY, DEPONENT STATED:

In view of my answers to the four preceding interrogatories, I deem it unnecessary to answer this interrogatory.

IN ANSWER TO THE TWENTY-SEVENTH INTERROGATORY, DEPONENT STATED:

There is no rule governing the stowage and distribution of cargo relatively to the weights of the

(Deposition of Y. Yano.)

different parts thereof, in vessels of the size and construction of the S. S. "Saigon Maru", but it is a most important principle, recognized by seafaring men, that the cargo should be stowed in the vessel so as to keep proper stability and trim and so as to make the vessel seaworthy and assure a safe voyage to her destination. The stowage of deck cargo is entirely left to the captain's opinion and no one compels the captain, against his opinion, to load larger amounts, because the individual vessel has its own character, even in vessels of the same type and similar construction, and the safety of the vessel at sea depends upon the ability of the captain, who maneuvers the vessel himself. So it is the proper and reasonable way, as to the amount of deck cargo to be carried, to follow the opinion of the captain, who has absolute responsibility on his vessel and knows the character of his vessel better than others.

As an instance, if several vessels of the same size, type, construction and of similar character were to be loaded with the same amounts of deck cargo of lumber in the same manner, and were sent out, in similar condition, on the same route in the same season, and one of these vessels was to meet with an accident caused by such a stowage of deck lumber, although the other vessels reached their destination in safety, the stowage of these vessels would not be reasonable or proper, in my opinion.

In the United Kingdom the law prohibits the loading of lumber to a height of more than 3 feet on

(Deposition of Y. Yano.)

deck in the winter season, on any steamer coming to or leaving any port of the United Kingdom (Section 451, Merchants Shipping Act, 1894). The S. S. "Saigon Maru" was to make the voyage to the China Sea and Indian Ocean in the summer season, and was liable to encounter typhoons in the China Sea and strong southwest monsoons in the Indian Ocean. Such typhoons and monsoons are said to be similar to or worse than the weather in the North Sea in the winter season.

In the coasting trade in Japan I have never seen any steamer laden with more than 6 feet in height of lumber on deck.

With the opinion of the authorities among the seafaring men in England and my experienced knowledge, extending over many years, as to the seafaring and shipping business, I can make the following conclusion: The quantity of deck cargo of lumber which was taken by the S. S. "Saigon Maru" at Portland, Oregon, in the early part of June, 1917, was the maximum amount of deck load for said vessel upon the contemplated voyage to Bombay, India, in that season of the year.

Y. YANO.

E. R. Dickson, American Vice Consul.

(Deposition of Y. Yano.)

"EXHIBIT A."

Noon Position

Date	Lat.	Long.
June 5th	4-00- 0.4	Left Portland
" 6th	47-47-42 N.	127-58- 0 W.
" 7th	49-11-30 "	132- 6- 0 "
" 8th	50- 4- 0 "	135-32- 0 "
" 9th	50-33-30 "	139-10- 0 "
" 10th	51- 7-45 "	143-54- 0 "
" 11th	51-38-50 "	148-36- 0 "
" 12th	51-59- 0 "	152-49- 0 "
" 13th	" "	158-25- 0 "
" 15th	51-56- 0 "	163-20- 0 "
" 16th	51-44- 0 "	167-24- 0 "
" 17th	51-21- 0 "	172-17- 0 "
" 18th	50-38-45 "	177-48-30 "
" 19th	50-25-45 "	177-17-30 E.
" 20th	50-14-45 "	171-52- 0 "
" 21st	49-30-30 "	167-17- 0 "
" 22nd	48-18-45 "	162-33- 0 "
" 23rd	47-27- 0 "	158-50- 0 "
" 24th	45-37- 0 "	155-10- 0 "
" 25th	43-24-45 "	150-55- 0 "
" 26th	41-11-57 "	146-48- 0 "
" 27th	39-32-30 "	143-40- 0 "
" 28th	36-39-30 "	141-25- 0 "
" 29th	34-32-30 "	138-45- 0 "
" 30th	33-18- 0 "	135-28- 0 "
July 1st	31-36- 0 "	131-54- 0 "
" 2nd	32-27-30 "	129-45- 0 "

(Deposition of Y. Yano.)

		Noon Position	
Date	Lat.	Long.	
" 3rd	Nagasaki		
" 4th	32-17- 0 N.	129-12- 0 E.	
" 5th	30-38- 0 "	126-48- 0 "	
" 6th	28-37- 0 "	124- 9-30 "	
" 7th	26-51-30 "	122-11- 0 "	
" 8th	25-12- 0 "	119-46- 0 "	
" 9th	22-55-30 "	117-13- 0 "	
" 10th	20-11-15 "	115-38- 0 "	
" 11th	17-18- 0 "	114-22- 0 "	
" 12th	14-35-45 "	112-25- 0 "	
" 13th	11-24-30 "	111-13-30 "	
" 14th	8-40-40 "	109-33- 0 "	
" 15th	6-14- 0 "	107-38- 0 "	
" 16th	3-21- 0 "	105-47- 0 "	
" 17th	Singapore		
" 18th	2-27- 0 N.	101-40- 0 E.	
" 19th	4-20- 0 "	99- 0- 0 "	
" 20th	5-52- 0 "	96- 6- 0 "	
" 21st	6-21-45 "	93-24- 0 "	
" 22nd	5-56- 0 "	90-48- 0 "	
" 23rd	5-56-15 "	88-39- 0 "	
" 24th	5-53- 0 "	85-46-30 "	
" 25th	6-18- 0 "	82-57-15 "	
" 26th	5-51-15 "	80-36-45 "	
"	7- 1-30 "	78-43- 0 "	
July 27th	8-30- 0 "	76-43 0 "	
" 28th	1		

(Deposition of Y. Yano.)

Noon Position		
Date	Lat.	Long.
" 29th	11- 1-15 N.	74-55-30 E.
" 30th	13-16-24 "	73-41- 0 "
" 31st	15-47- 0 "	73-29- 0 "
August 1st	17-51- 0 "	72-24- 0 "
" 2nd	Bombay	
" 3rd		

Y. YANO.

E. R. DICKOVER,
American Vice-Consul."

Filed February 25, 1918, G. H. Marsh, Clerk.

CERTIFICATE OF E. R. DICKOVER, AMERICAN VICE CONSUL, ATTACHED TO DEPOSITION OF Y. YANO.

In the District Court of the United States for the
District of Oregon.

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libelant,

vs.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.,

Respondent,

OSAKA SHOSEN KAISHA, a corporation, organized and existing under the laws of Japan,

Claimant.

(Deposition of Y. Yano.)

EMPIRE OF JAPAN, HYOGO PREFECTURE, } ss.
American Consulate

I, Erle R. Dickover, the duly appointed and acting United States Vice Consul, at Kobe, Japan, duly authorized under and by virtue of the Acts of Congress of the United States, and of the Revised Statutes of the United States to take depositions in causes pending in the Courts of the United States, do hereby certify that pursuant to the attached stipulation, I was requested to and did proceed with the taking of the deposition of Y. Yano; that said Y. Yano appeared before me on the 24th and 25th days of January, 1918, as a witness in the above entitled action on behalf of the claimants, and was of sound mind and lawful age, and was by me first carefully examined, cautioned and sworn to testify the truth, the whole truth and nothing but the truth, that forthwith thereafter the interrogatories attached to said stipulation were propounded by me to the said Y. Yano, and the answers of said Y. Yano were reduced to writing by myself at the American Consulate at Kobe, Japan, from the statements of the said Y. Yano, and that after carefully reading the same to said witness, he subscribed the same in my presence; that I have retained the said deposition in my possession for the purpose of forwarding the same with my own hand to the Clerk of the United States District Court for the District of Oregon at Portland, Oregon, the court for which the same is taken, in a sealed envelope addressed to said Clerk, after

(Deposition of Y. Yano.)

having endorsed on the corner thereof the following:
"Deposition of Y. Yano, a witness for claimant in
action by Pacific Export Lumber Co. vs. S. S. 'Sai-
gon Maru,' No. 7467"; I do hereby further certify
that I am not counsel nor attorney for either of the
parties in said deposition or caption named, nor in
any way interested in the event of the cause named
in said caption.

In testimony whereof, I have hereunto set my
hand and seal this 30th day of January, in the year
of our Lord, 1918.

E. R. DICKOVER,

Vice Consul of the United States
of America at Kobe, Japan.

(Seal of American Consulate)

Filed February 25, 1918. G. H. Marsh, Clerk,

By F. L. Buck, Deputy.

After the close of the evidence the case was contin-
ued to March 16, 1920, for oral argument, but was not
argued orally, having been afterwards submitted on
written arguments only and taken under advise-
ment.

And afterwards, to wit, on the 16th day of Au-
gust, 1920, there was duly filed in said Court, Opin-
ion of the Hon. Chas. E. Wolverton, United States
District Judge, on the Merits, in words and figures
as follows, to wit:

(Opinion of Hon. Chas. E. Wolverton.)

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, furniture, etc.,

PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libelant,

OSAKA SHOSEN KAISHA, a corporation,

Claimant.

Wood, Montague & Matthiesen, of Portland, Oregon,
For Libelant;

Huffer & Hayden, of Tacoma, Washington,
For Respondent and Claimant.

WOLVERTON, District Judge.

This is a libel, instituted by the Pacific Export Lumber Company against the Japanese Steamer Saigon Maru, to recover damages alleged to have been sustained by the libelant by reason of the vessel's having refused to carry a full deck-load of sawn lumber, which it had by charter party contracted to do.

On or about March 19, 1917, libelant and claimant, Osaka Shosen Kaisha, entered into a charter party, whereby libelant chartered the "Saigon Maru" to carry a full cargo of lumber or timber, including a full deck-load, from a port on the Colum-

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bia or the Willamette River to Bombay, India. Pursuant to the charter party, the steamer came to Portland, and here received on board a full cargo of lumber within her hold, and 241,559 feet, board measure, on her deck, but refused to take any further amount. The libelant, claiming that the vessel could safely carry on deck on her voyage 750,000 feet, and was about to depart without taking on the full cargo which she has contracted to carry, instituted this libel to recover the damages which libelant would sustain by reason of such default on the part of the ship. Libelant bases its damages upon loss of profits on its sale of lumber to lumber merchants in Bombay, that is to say, upon the portion sold and not delivered, and its liability to such lumber merchants for failure to deliver to them the amount contracted to be delivered at Bombay, relying upon the due fulfillment of the charter-party on the part of the ship, for transportation of the lumber to that port, as agreed. Among other things, it is alleged that libelant had sold the cargo of lumber to be carried to Gillanders, Arbuthnot & Co., Bombay; the amount being 5500 tons, ten per cent more or less, so that the minimum quantity to be delivered under the contract was 4950 tons; that the owners and agents of the "Saigon Maru" knew, when they chartered her to libelant, that libelant had sold the cargo in Bombay, and was chartering the vessel for the express purpose of transporting such cargo to

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Bombay, and that a certain portion of said cargo would consist of timbers of long lengths.

The vessel having agreed to carry a full cargo of lumber, including a full deck-load, the question to be settled is whether she was of sufficient capacity to carry safely the amount on deck that libellant claims she should have carried, or any greater amount than she did carry, having in view the voyage which she undertook to make.

The "Saigon Maru" is a tramp steamer, in length 354 feet, breadth of beam 50.3, and depth of hold 28.2, with gross tonnage of 4354, and net 2740. The route of the voyage took the vessel through the North Pacific Ocean to Nagasaki, Japan, thence through the Strait of Formosa and the China Sea to Singapore, thence through the Strait of Malacca, by Achin Head, and through the Indian Ocean, up the coast by Colombo, and thence on to Bombay. The vessel left Portland June 5th, and arrived at Nagasaki July 2, at 2:30 P. M. She proceeded on her voyage July 4th, at 5 A. M., and arrived at Singapore July 17th, at 2:15 P. M. She weighed anchor at 5:30, and proceeded on to Bombay, arriving there at 12:50 P. M. August 2nd. Her voyage took her through the North Pacific at the quiet season of the year, when rough seas were not to be expected; through the China Sea at a season when typhoons were to be expected; and through the Indian Ocean in the monsoon season. The voyage, however, was made without incident, or the encountering of unusual

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stress of weather anywhere on the route; the log indicating at the worst, "Sea rather rough," with a wind velocity of from 4 to 5.

The libelant produced, in support of its contention that the vessel did not take on a full deck-load of lumber, Captains Emile C. Genereaux, Andrew Hoben, and W. C. McNaught, all marine surveyors of long experience in that line, as well as upon the sea in various capacities. All these men were present while the ship was taking on her cargo, and made a survey of her as to her seaworthiness. Genereaux and Hoben were of the opinion that she could have safely carried 700,000 feet of lumber on deck. The former seemed to have no doubt of it, while the latter was more conservative, but, nevertheless, rather firm in his view that such a load would not have endangered her navigation on the voyage. Captain McNaught said:

"I considered, owing to the dimensions of the ship, that she ought not to have had less than 600,000 feet of lumber—not less—and then not been near to her marks, and had plenty of stability; possibly 700,000—I wouldn't say—but not less than 600,000 feet of lumber. * * * minimum deck-load for ship of that size and dimensions."

These men were handicapped in determining what the stability of the vessel would have been with such a deck-load upon her, for the reason that the captain of the vessel positively refused to permit any more lumber to be put aboard than the deck-

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load with which she went to sea; nor would he allow any of the usual tests to be made to determine the vessel's stability as the loading continued.

Henry Rothschild, president and manager of Brown & McCabe, stevedores, who had loaded many lumber cargoes for all parts of the world, was of the view that the "Saigon Maru" should have carried 400,000 or 500,000 feet more in her deck-load, "compared," as he says, "with other vessels that we have loaded."

Mr. W. D. Wheelwright, president of the libellant company, who has had long experience in shipping lumber to the Orient and the west coast of South America, and elsewhere, was of the opinion that the "Saigon Maru" should have carried, at that season of the year, a minimum deck-load of 750,000 feet. He also gives a list of four vessels of similar dimensions to the "Saigon Maru", which carried deck-loads ranging from 620,175 to 854,308 feet, being an average of 743,587 feet.

The stanchions were first put in, of sufficient length to accommodate the larger deck load. The captain directed these to be sawed off to suit the load which he had made up his mind to take. It should be observed in this connection that Captain Hoben and Captain McNaught, and perhaps Genereaux, had had large experience as seamen in the China Sea and the Indian Ocean, and, of course, had in mind the vessel's intended voyage. Captain McNaught, in speaking of these seas for the months

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of June, July, and August, was of the view that they were not worse than numerous other parts of the oceans of the world, or that the storms are much more frequent.

Besides the cargo of lumber, the vessel carried 500 tons of coal on deck, 200 tons between decks, and somewhat over 500 tons in her hold. To be more particular, she left port with from 1210 to 1220 tons aboard. Her trimming tanks were all full; also her fresh water tanks, except one small one, of 18 tons capacity, which was partially filled. These tanks have a capacity of 901 tons.

The captain's reasons for not taking more cargo on deck were two, namely: That the terrible seas through which he had to navigate would not permit of it, and that a higher deck load was liable to interfere with his steering rods, and thereby endanger the ship and cargo. The steering rods are carried, one on either side of the ship, on iron stanchions extended "approximately three foot six above the bulwark" rail, and strengthened by stays, some running from the bulwark rail and some from the deck, which the captain describes as very strong. The bulwark rail is about four feet in height. These steering rods, as described by the captain, run about two inches outside the lumber stanchions, being timbers 6x12 to 8x12, by which the deck load was secured to the ship. The witnesses for libellant place the rods at a greater distance. For instance, Genereaux says that, "if the deck load had been con-

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tinued, it could have been kept two feet away from the steering rods without any trouble whatsoever." Cullum thought the sag would be anything up to four inches, or over. The danger which Captain Yamamoto seemed to fear was from the sag in the load which might be produced by the wind and the sea constantly breaking against the ship; but the surveyors were sure that the load could and would have been so constructed and secured as to obviate any danger from sag that would affect the steering rods. A deck load of 700,00 to 750,000 feet would, according to Genereaux, have carried it up forward about 10 feet and aft about 8, and, of course, above the level of the steering rods. This witness also relates that, about a month previous to the loading of the "Saigon Maru," there was loaded in this port the steamer Luckenbach, "with 11-ft. deck load, with similar arrangement of steering rod as the 'Saigon Maru.'" The deck cargo, as loaded, was six feet high forward, and four feet aft.

A sag, as the witnesses all agree, is not a shifting or a spreading of the load, but a settling to one side or the other, as a ship may be said to sag by the forces or stresses it encounters at sea.

Without attempting to discuss further the evidence bearing upon the objection to carrying a larger deck load because of the arrangement of the steering rods, I am firmly persuaded, from a careful survey of the whole testimony, that it is without potency or force.

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Now, as it pertains further to the loading of the ship, Captain Yamamoto has been long on the sea, much of the time as captain, and had served a year and seven months as master of the "Saigon Maru." Describing the southwest monsoon in the Indian Ocean, he says it continues for about five months in the year, from June to October; that his course from Colombo to Bombay is generally northwest, and that the sea attacks his steamer from port beam. "Generally," he proceeds, "on that ocean the strong southwest wind blows continuously, and blows with violent and vehement waves and high swell, at that season. Sometimes the wind in that season might be quiet, but generally it is continuously blowing hard, with much rain, continuous rain. It is called the rainy season." The swell "causes the rolling of the vessel, and that is most dangerous to the ship. * * * Of course there is a difference according to the wind and waves, but it rolls violently and tremendously. * * * Comparatively speaking, the wind is not so high. I might indicate that by the numbers 6 to 7. * * * The sea swell is harder than the power of the wind. Generally the wind and sea come together in the same degree, but on the Indian Ocean the sea swell is harder comparatively than the wind. * * * Continuously on the voyage the dashing of the waves is up on the deck."

Mr. Cullum describes a little more fully in this respect. He says, speaking of a ship the size of the "Saigon Maru":

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"Well, I doubt if the seas would come along and hit the lumber, you know. The spray would go all over it certainly. I don't say the seas would go over it. If it hit the lumber, the spray would go over it, yes. The sea would hit the lumber on the side. I dare say there would be squalls come along that the sea would go over her, but not all the time."

Describing the typhoon of the China Sea, Captain Yamamoto goes on to say:

"I met with a typhoon on the China Sea very often. * * * With or without deck cargo, it is the same when the vessel meets the strong typhoon; it would not avoid a wrecking of the ship. I will correct my answer. With or without the deck cargo it is the same for any vessel which encounters the strong typhoon in that season, which might result in the wreck of the ship; that is it may occur, because the typhoon is strong. (If it is in the center of the typhoon.) And I wish to emphasize the danger to the ship in such a season with a heavy deck load."

He says, further, that these typhoons occur about every two or three days in July, referring to "all kinds" of typhoons, "sometimes bad, sometimes not so dangerous, sometimes very dangerous." Being asked, "And how often do you expect to meet a terrible typhoon in July?" he answered, "That may be three or four times." He has taken voyages through the China Sea "very often"; six with the "Saigon Maru," aside from the one from this port. Some

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of them were in the stormy season. Witness relates that he met with a typhoon perhaps twice, but not heavy, and a strong southwest gale. He further relates that ships never carry deck loads from Japan to Singapore during the typhoon season. In this general statement he is corroborated, in the main, by Yamaguchi, and in some respects by Cullum. Being asked as to what he thought was a reasonably safe cargo for the "Saigon Maru" to carry on deck, with her hold full of lumber, the witness answered: "I think about 300 or 330 tons; something more than 300 tons on deck." Further, he states that the reasonable G. M. of a vessel like the "Saigon Maru," carrying cargo, is "from one to two feet." This means the distance between the center of gravity and the metacenter.

Mr. Yamaguchi, who had had large experience as captain and master of a vessel, was asked to give his opinion as to what amount of cargo the "Saigon Maru" should have carried on her deck, and in effect answered that, with the bottom weight 150 tons heavier than the deck load,—"that means both bunker coal and cargo; so that if bottom weight or water in tanks is 883 tons minus 150 tons, making 733 tons for the weight on deck, in the best condition; * * * deducting the bunker coal 500 tons, the deck load would be 233 tons in weight." This on the basis that the ballast tanks were full, and the ship had 2,436,800 feet of lumber in her hold. He said further that he thought the maximum amount

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of cargo that could have been carried on deck was 383 tons, but that such an amount on deck would have made the ship a little tender.

Yamamoto further relates that an experiment was made at Nagasaki to ascertain the G. M., and it was found to be 1.36, with the coal and lumber cargo the same as at Portland, but with 150 tons less water in her fresh water tanks. An estimate has been made from this basis by Captain Okuda, that the G. M. at Portland would decrease in proportion to the increase of the deck load, as follows:

With 700,000 feet deck load the G. M. would be	.57
600,000 "	.83
500,000 "	1.07
400,000 "	1.09
(This should probably be increased by at least	.20)
300,000 feet	1.53
241,000 "	1.67

It is further in evidence that the ship's G. M. would increase for the first eight days of her voyage, by the consumption of her coal and fresh water from her tanks. From then on to Nagasaki, according to the estimate from her G. M. at Nagasaki, she would become more tender. The estimate of her consumption of coal was about 32 tons per day, from 30 to 32 tons. She took on 1050 tons at Nagasaki, and then had on board for her further voyage 1300 tons. This would indicate that she consumed about 950 tons between Portland and Nagasaki, or about 37 tons per day of her 26 days' voyage. This dis-

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crepancy has not been explained. It furthermore appears that, when the vessel reached Bombay, she had on board 500 tons of coal, making her consumption less on a distance of about 200 miles greater than from Portland to Nagasaki. It is to be remembered that her voyage between the latter ports was through comparatively smooth seas, and without unusual incident, and the consumption of coal should at least have been no greater than from Nagasaki to Bombay.

But, to a consideration of the question whether Captain Yamamoto should have carried a larger deck load. He stated plainly that he would not have carried more than he did, regardless of the condition of the steering rods, because he seemed to think that it would affect the stability of his ship. He is a seaman of large experience, and much weight must be attached to his honest and sincere judgment as to the peculiarities of his ship and its capacity to carry deck loads upon a projected voyage, and we must not overlook this feature attending the controversy. *The Addison E. Bullard*, 252 Fed. 241; *Weston et al. v. Foster et al.*, 29 Fed. Cas. No. 17-452. He had, however, scarcely any practical experience in navigating ships with deck loads of lumber cargo. As to the anticipated typhoons and his dread of the monsoon, I am impelled to the view that he has very greatly exaggerated their terror to seamen. His own experience has called him upon many voyages through the China Sea, and frequently

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into the Indian Ocean, yet he relates but one or two incidents when he has encountered a typhoon, while he has more frequently encountered gales resulting from cyclonic conditions; but he has never met with any serious mishap. Furthermore, the mariner, perhaps universally, has 24 hours' notice of the coming of a typhoon, and is enabled thereby to avoid its disastrous effects. He may of necessity encounter at times the heavy seas and storms that result from the cyclonic conditions, but rarely the central disturbance that is so fatal to navigation. These resulting disturbances are perhaps no greater, nor more to be dreaded, than the seas elsewhere, where navigation is constantly under way.

As to the monsoon, it would seem to be not so perilous as Yamamoto was constrained to believe. It consists of a steady southwesterly wind, only occasionally of violent proportions, which continues for a considerable time, and blows up what is termed a "short chop" of sea swell. The monsoon is encountered only after passing Achin Head, from which point it is a 13 days' voyage to Bombay. From Achin Head to Colombo the course is mainly west, and the southwest breeze strikes the ship on its port bow. From Colombo to Bombay, the sea is on the ship's beam, or port quarter. Yamamoto's apprehension as to this sea was that it would cause a sag in the deck load, which might prove injurious to the ship and cargo. By the time, however, the vessel arrived at this last lap of the voyage, the deck

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load would have so settled and been drawn together by its lashings, that a sag could hardly be expected in such proportions as to give trouble.

Turning to the *G. M.*, Okuda's estimate gives the *G. M.* in Portland, on a deck load of 500,000 feet, as 1.07. This would be reduced, as the voyage proceeded to Nagasaki, by the consumption of water and coal from the lower hold, so that it would fall below one foot, and thus make the ship too tender, or unstable. In this relation, however, there is another condition to be considered. The coal required to carry the vessel to Nagasaki was 832 tons plus 25 per cent to meet emergencies, making a total of 1040 tons. The ship carried from 1210 to 1220 tons, an excess of from 170 to 180 tons. That amount in tonnage of lumber could have been carried on deck in place of the coal. Furthermore, Yamaguchi was of the opinion that the vessel could have carried 60 tons more on deck than she did carry. This would make a very substantial addition to the deck load. The vessel cannot carry a quantity of coal for its own purposes, other than as fuel for the voyage, and thus deprive the charterer of space to which he is entitled. *Darling & Son v. Raeburn*, 10 *Aspinall* (N. S.) 268; on appeal 429.

As to the water ballast, it is obvious that, while it seemed to be necessary to carry the trimming tanks full on account of their construction, to prevent the water from flowing from one side of the ship to the other, and thus add to the stability of

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the ship in navigation, No. 3 of the fresh water tanks could have been filled at sea, to give more ballast if needed; that is, if it was found the ship was becoming too tender.

It is impossible, from the meager testimony that we have as to the ship's G. M., and the doubtful reliability of the deductions made from the G. M. ascertained at Nagasaki, considering the varying conditions of the ship's load, satisfactorily to determine from the G. M. basis the amount the ship could safely carry on deck. The testimony is of real value, however, as indicating a range of probability respecting the amount of deck cargo above which it would be unsafe for a ship to venture on the seas. Considered along with the testimony of the surveyors and other witnesses of experience in loading vessels, I am drawn irresistibly to the conclusion that, by proper loading, the "Saigon Maru" could have carried 550,000 feet of lumber on her deck, with reasonable safety, in view of the voyage contemplated. There was, undoubtedly, no ulterior motive impelling the captain to refuse to take on board a larger deck load, but obviously he was unduly timid, and committed an error in judgment, all in good faith on his part. See, in support of this conclusion, *The Helios*, 108 Fed. 279, 284.

This brings us to a consideration of the liability of the vessel, if liable at all, for the damages the libellant has sustained.

By the charter party, the owner of the steamer

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"Saigon Maru," or the steamer, we may say, agrees on the chartering of the whole of the vessel, including the deck, with certain exceptions not essential to the inquiry. The charter party was brought about through certain correspondence and conferences had between the libelant and the representative of the ship, namely, Edwin Orrett, local manager at Tacoma. The first inquiry was by Orrett of the libelant, touching whether there were any offers of lumber for Bombay. Libelant replied that it had an offer from friends in Bombay for a full cargo of Oregon pine lumber, not to exceed 4,500,000 feet, cargo to be furnished according to an enclosed schedule called ADNECI, and giving somewhat the proposed terms of loading, discharging, demurrage, etc. On March 13, 1917, Orrett advised that he had a cable from claimant that the "Saigon Maru" would be available for full load for April or May loading. Libelant answered on the same date, March 13th, and, after stating some conditions that would be agreeable to it, closed by saying: "We are cabling Bombay so as to be in position to close on receipt of your reply." A day or two later—the date is not given—libelant wrote to Orrett, "We have your telegram of today, and enclose copies of our two messages of this date to you, hoping that you and we may both receive cables tomorrow from Japan and Bombay respectively, that will enable us to close this matter up; so we hand you herewith a form of charter party into which should be filled,

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on lines 4 and 5, the location and the prospective voyage of the steamer, and on lines 83 and 84 the cancelling date and the date when laydays are to begin." On the 15th libelant telegraphed Orrett waiving "condition re extra insurance on deck; still awaiting reply from Bombay"; and on the 17th libelant telegraphed, "We accept 'Saigon' on terms of charter party mailed 13th," noting some change of conditions suggested therein. Mr. Wheelwright states that the telegram was sent at 10 o'clock A. M., and closed everything except the conditions about laydays for discharging. Libelant wrote Orrett also, on the 17th, confirming the telegram of acceptance. On the 19th Orrett wrote, returning the form of charter party, and indicating that the specification submitted was satisfactory; also advising that the ship would be found to be a fair lumber carrier, and requesting the libelant to make up a charter party incorporating the conditions set forth in his letter. Libelant replied on the 20th, enclosing eight signed copies of the charter party for the signature of the local manager.

The negotiations leading up to the sale of the lumber by libelant to Gillanders, Arbuthnot & Co. began with a letter from that company, of date December 14, 1916, enclosing a schedule of 4,500,000 feet of lumber. The next step was a cable by libelant to them, of date March 3, 1917, saying: "We think there is good prospect 7500 loads of 50 cubic feet, 180 shillings per load basis c.i.f. per steamer

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Bombay March-April-May shipment." Gillanders cabled March 10th: "We give you firm offer as per your telegram of March 3, 7500 loads of 50 cubic feet. * * 180 shillings per load including war risk." The price named is the one at which the parties finally closed. On the 12th libelant telegraphed Gillanders: "Working. Understand 180 per load basis offer to stand good until advised to the contrary." On the 13th, libelant again cabled: "Think can accept subject your approving charter 'Saigon Maru,' estimated 3,300,000, Osaka Shosen Kaisha represent making April-May clearance; freight prepaid; option substitute another at least equally near loading port, not exceeding four and a half millions. Confirm quickly." Gillanders cabled on the 17th: "As per your telegram of 14th March we confirm the offer to stand good until advised to the contrary. Do your utmost to make maximum quantity 6000 loads of 50 cubic feet." On the same day they telegraphed again: "Referring to your telegram of 14th we cannot consider terms of charter. Our offer is (stating it). On this understanding we agree to 5500 tons, 3300 thousand feet, but we cannot agree option of another steamer unless similar quantity." The reference to telegram of 14th is to the above telegram sent to Gillanders of date the 13th. In this relation, Wheelwright testifies that he spoke to Orrétt with reference to substituting another steamer up to 4,500,000, and that they did not favor it. On the same day, March 17th,

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at 5:40 P. M., libelant cabled: "Your telegram to hand. We conform to contents. Expect close 'Saigon Maru' estimated 5500 loads of 50 cubic feet." It was explained that "We conform to contents" means "We accept your offer." That was the contract finally with Gillanders, Arbuthnot & Co. All these cables were based on the ADNECI schedule,

I have endeavored, by the references to the correspondence touching both relations, to give only so much as will fairly represent the trend of the negotiations, and the pertinent language essential to the present inquiry.

The rule relating to damages attending a breach of contract is thus lucidly stated in *Hadley v. Baxendale*, 9 Exch. 341:

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, (i. e., according to the usual course of things), from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably con-

(Opinion of Hon. Chas. E. Wolverton.)

template, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."

Mr. Benjamin deduces the following rule from the English cases, where goods have been bought for resale, and there is no market in which the buyer can readily obtain them:

"If, at the time of making the contract, the seller knows that the buyer buys the goods with the intention and for the purpose of reselling them, although he may or may not know of any particular subcontract existing or contemplated, the inference is that the seller contracts to be liable for the increased damages which will flow from a breach of the contract under the special circumstances; and, applying the second part of the rule laid down in *Hadley v. Baxendale*, those damages may readily be supposed to be within the contemplation of the parties."

The American doctrine is substantially the same, and is thus stated in *Hockersmith v. Hanley*, 29 Or. 27, 38:

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"A person injured by the breach of a contract to which he has become a party with another is entitled, upon principle, to recover damages commensurate with the injury he has sustained, and this will include gains prevented as well as losses sustained. They must be such, however, as naturally result from the breach, or may reasonably be considered to have been in the minds of the parties at the time of entering into the contract; the contract itself being, impliedly at least, formulated with reference thereto in the event of a violation of its conditions. The intention of the parties is to be ascertained from a consideration of the contract taken in connection with the surrounding circumstances and conditions of which they are cognizant; and if the circumstances and conditions are such as to make it apparent that the contract was entered into and known by the contracting parties to have been consummated to enable one of them to serve or accomplish a particular purpose, the liability of the other for its violation will be determined and the damages ascertained with reference to the effect of the breach in hindering or defeating the contemplated object. They must also be certain, and flow directly and naturally from the breach; or, to put it in another way, they must not be the remote but the proximate consequence thereof, and not speculative or contingent."

Numerous cases are cited in support of the

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text. Among them, see *Cockburn et al v. Ashland Lumber Co.*, 54 Wis. 619.

As relating to a contract to carry, see further, *Cobb, Blasdel & Co. v. The I. C. R. R. Co.*, 38 Iowa, 601.

The principle of just compensation is paramount, which means that it shall be commensurate with the loss or injury sustained, and, of course, not in excess thereof. 1 *Sutherland on Damages*, 47-48. Further discussing the law of damages, the learned author says (p. 203):

"Damages are not the primary purpose of contracts, but are given by law in place of and as a compensation and equivalent for something else which had been agreed to be done and has not been done. What the damages would ordinarily be on such a default is immaterial if the contracting party assumed the obligation he has broken with a knowledge of a peculiar state of facts connected with the contract which indicated that other damages would result from a breach, and the latter are claimed. To confine the injured party's recovery in such case to the lighter damages which usually follow such a breach, where no such known special facts exist, and exclude those which were thus brought within the contemplation of the parties, would be to sacrifice substantial rights to arbitrary rule; to set aside the principle which entitles a party to compensation commensurate with his injury to give effect to a rule formulated to render that principle

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effectual; it would be to apply a subordinate rule where it has no application instead of the principle, which is paramount and always applicable. What are the usual damages which result from the breach of contract? There is certainly no customary amount, nor is there any rule of damages which is universal like the principle for allowance of due compensation. If it is a contract of sale and the vendor refuses to complete it, one rule is to ascertain that compensation by the difference between the contract price and the market value, because if the article which is the subject of the contract can be obtained in market at a market price the vendee is thereby enabled to supply himself without loss unless the price has increased. That rule goes no further, but the principle does. Where the vendee cannot obtain the article in the market, nor at all if the vendor refuses to perform his contract, that rule is not applicable, and then resort must be had to other elements of value; and recourse is had to the principle to determine the measure of redress; even a contract of resale made by the vendee and of which the vendor had no notice may be considered."

See, also, *Strom Bruks Aktie Bolag v. Hutchison*, 10 *Aspinall*. 138, 140-41.

The general rule respecting the measure of damages, on refusal to perform a contract for transportation, is "the difference between the market value at the destination when the goods should have ar-

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rived, if carried in accordance with the contract, and the value at the same time at the point of shipment, less what it would have cost the shipper under the contract to have had the goods transported, that is, freight charges and other necessary expenses." 6 Cyc. 525.

This, like all general rules, however, is inapplicable in exceptional cases.

It is a feature in the present case that, owing to war conditions, libelant was practically unable, at the time of default, to procure transportation to carry to Bombay the lumber left behind. If it could have been procured at all, it would have been at very greatly increased cost, and, if libelant had resorted to that means of invoking the general rule, the claimant would have suffered beyond what would seem to be reasonable damages.

The facts disclose that claimant had practical knowledge that libelant was negotiating for a sale of the cargo, or at least a part of it, in Bombay, when negotiations for the charter party were under way. Orrett was advised at the very outset that libelant had an offer from friends in Bombay for a full cargo not to exceed 4,500,000 feet, of lumber. Later, as the negotiations proceeded, Orrett was advised by libelant that it was "cabling Bombay so as to be in position to close on receipt of your (Orrett's) reply." Still later libelant expressed to Orrett a hope that "we may both receive cables tomorrow from Japan and Bombay respec-

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tively that will enable us to close this matter up." And then on the 15th of March, Orrett was advised that libelant was "still awaiting reply from Bombay." The contract with Gillanders, Arbuthnot & Co. was closed on the 17th by cable, dispatched at the hour of 5:30 P. M., and the negotiations with Orrett for the charter party were closed on the same day by dispatch forwarded at the hour of 10 A. M. It cannot alter the case that libelant closed with claimant a few hours previous to closing with correspondents at Bombay. The fact remains that claimant had full knowledge of libelant's purpose in securing the charter party, and entered into the charter party with a view of enabling libelant to further, and even to consummate that purpose. Nor was it essential, under the authorities, that claimant should have been advised of the exact conditions of the contract of sale to Gillanders, Arbuthnot & Co. It was sufficient that it had knowledge of the fact that such a sale was in contemplation, dependent upon securing the charter party.

The damage claimed under the first head is the loss of profits libelant sustained in not being able to deliver, under its contract, the cargo left at home to Gillanders, Arbuthnot & Co. at Bombay. The loss sustained was at the rate of \$7.955 per thousand. I take this from Mr. Wheelwright's statement, which stands uncontradicted. The amount of lumber which claimant failed to carry

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that it should have carried is 308,441 feet, making the damages \$2453.65. This seems a fair adjustment under the conditions prevailing.

Objection is made that libelant purchased the lumber in this port in March at a much lower figure than could have been procured in June, when the vessel sailed, or on August 2nd, when the cargo arrived at Bombay. But it is a sufficient answer to this that the lumber was purchased for the "Saigon Maru's" cargo, and the rate of loss named was the actual damage sustained by the claimant's failure to carry. Such are the damages that were legally in the contemplation of the parties when the charter party was entered into.

The damage claimed under the second head is the amount claimed by Gillanders, Arbuthnot & Co. against libelant for a failure to deliver the lumber left at Portland. Libelant has not as yet paid these damages, but the same have been liquidated, and there can be no question as to libelant's liability to pay them. These damages have been ascertained at Bombay—one item of 1075 pounds sterling, and another of 4550 rupees. These are the damages for which claimant, or rather the "Saigon Maru" is liable to libelant under the second head. As libelant is enabled to discharge these damages in the money of the realm where payable, the decree should be for the amount, in money of the United States, that will enable libelant to discharge such liability at this date, being the

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date of the entry of the decree. As the court is not advised as to the present rate of exchange of pounds sterling or the rupee, the adjustment will be made on counsel's furnishing the necessary information.

These last items of damages, as is obvious, are not so direct as the first, but it is apparent that they come within the general principles governing, as above ascertained.

The English statute alluded to in the evidence and argument can have no bearing on the present issues, especially as it has been repealed.

I have reviewed the authorities presented on exceptions to the libel, and now again insisted upon, whereby the sufficiency of the libel is challenged, but am constrained to adhere to my former ruling.

The claim for damages as here ascertained will bear interest at the lawful rate of six per cent per annum from August 2, 1917, and libelant will recover its proper costs and disbursements.

Filed August 16, 1920, G. H. Marsh, Clerk.

And afterwards, to wit, on the 4th day of October, 1920, at 2:30 P. M., there was duly filed in said court, claimant's exceptions to court's opinion on the merits and to the findings and holdings therein, in words and figures as follows, to wit:

CLAIMANT'S EXCEPTIONS TO THE COURT'S
OPINION ON FINAL HEARING AND FIND-
INGS THEREIN.

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a cor-
poration,

Libelant,

vs.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.,

Respondent,

OSAKA SHOSEN KAISHA, a corporation of
Japan, Claimant.

To the Above Entitled Court:

Now comes the claimant above named and ex-
cepts to the following portions of the opinion of
the court on final hearing filed herein on the 16th
day of August, 1920, and to the following findings
therein:

I.

Claimant excepts to the following portion of said
opinion, and to each and every finding therein con-
tained, to wit:

"These men were handicapped in determining
what the stability of the vessel would have been
with such a deck load upon her, for the reason that

(Claimant's Exceptions.)

the captain of the vessel positively refused to permit any more lumber to be put aboard than the deck load with which she went to sea; nor would he allow any of the usual tests to be made to determine the vessel's stability as the loading continued,"

on the ground and for the reason that the same are not supported by the evidence.

II.

Claimant excepts to the following portion of said opinion, and to each and every finding therein contained, to wit:

"These steering rods, as described by the captain, run about two inches outside the lumber stanchions, being timbers 6x12 to 8x12, by which the deck load was secured to the ship. The witnesses for libelant place the rods at a greater distance. For instance, Genereaux says that, 'if the deck load had been continued, it could have been kept two feet away from the steering rods without any trouble whatsoever,'"

on the ground and for the reason that the captain did not testify that the steering rods ran about two inches outside the lumber stanchions, but that the supporters of the steering rods, at the place where they rested upon the bulwark rail, were at said distance from the lumber stanchions, and on the further ground that libelant's witnesses were testifying about the steering rods and claimant's wit-

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nesses were testifying about the base of the steering rod supporters.

III.

Claimant excepts to the following portion of said opinion, and to each and every finding therein contained, to wit:

"Without attempting to discuss further the evidence bearing upon the objection to carrying a larger deck load because of the arrangement of the steering rods, I am firmly persuaded, from a careful survey of the whole testimony, that it is without potency or force,"

on the ground and for the reason that said finding is not supported by the evidence.

IV.

Claimant excepts to the following portion of said opinion, and to each and every finding therein contained, to wit:

"It furthermore appears that, when the vessel reached Bombay, she had on board 500 tons of coal, making her consumption less on a distance of about 200 miles greater than from Portland to Nagasaki. It is to be remembered that her voyage between the latter ports was through comparatively smooth seas, and without unusual incident, and the consumption of coal should at least have been no greater than from Nagasaki to Bombay,"

(Claimant's Exceptions.)

on the ground and for the reason that said finding is not supported by the evidence.

V.

Claimant excepts to the following portion of said opinion, and to each and every finding therein contained, to wit:

"He had, however, scarcely any practical experience in navigating ships with deck loads of lumber cargo. As to the anticipated typhoons and his dread of the monsoon, I am impelled to the view that he has very greatly exaggerated their terror to seamen,"

on the ground and for the reason that the same is not supported by the evidence.

VI.

Claimant excepts to the following portion of said opinion, and to each and every finding therein contained, to wit:

"Furthermore, the mariner, perhaps universally, has 24 hours' notice of the coming of a typhoon, and is enabled thereby to avoid its disastrous effects. He may of necessity encounter at times the heavy seas and storms that result from cyclonic conditions, but rarely the central disturbance that is so fatal to navigation. These resulting disturbances are perhaps no greater, nor more to be dreaded, than the seas elsewhere, where navigation is constantly under way,"

(Claimant's Exceptions.)

on the ground and for the reason that the same is not supported by the evidence.

VII.

Claimant excepts to the following portion of said opinion, and to each and every finding therein contained, to wit:

"As to the monsoon, it would seem to be not so perilous as Yamamoto was constrained to believe. It consists of a steady southwesterly wind, only occasionally of violent proportions, which continues for a considerable time, and blows up what is termed a 'short chop' of sea swell,"

on the ground and for the reason that the same is not supported by the evidence.

VIII.

Claimant excepts to the following portion of said opinion, and to each and every finding therein contained, to wit:

"By the time, however, the vessel arrived at this last lap of the voyage, the deck load would have so settled and been drawn together by its lashings, that a sag could hardly be expected in such proportions as to give trouble,"

on the ground and for the reason that the same is not supported by the evidence.

IX.

Claimant excepts to the following portion of said opinion, and to each and every finding therein contained, to wit:

(Claimant's Exceptions.)

"The coal required to carry the vessel to Nagasaki was 832 tons plus 25 per cent to meet emergencies, making a total of 1040 tons. The ship carried from 1210 to 1220 tons, an excess of from 170 to 180 tons. That amount in tonnage of lumber could have been carried on deck in place of the coal,"

on the ground and for the reason that the same is not supported by the evidence.

X.

Claimant excepts to the following portion of said opinion, and to each and every finding therein contained, to wit:

"Furthermore, Yamaguchi was of the opinion that the vessel could have carried 60 tons more on deck than she did carry,"

on the ground and for the reason that Captain Yamaguchi added, as stated elsewhere in the court's opinion, that with such a load the vessel would be a little tender.

XI.

Claimant excepts to the following portion of the said opinion, and to each and every finding therein contained, to wit:

"As to the water ballast, it is obvious that, while it seems to be necessary to carry the trimming tanks full on account of their construction, to prevent the water from flowing from one side of the ship to the other, and thus add to the stability of

(Claimant's Exceptions.)

the ship in navigation, No. 3 of the fresh water tanks could have been filled at sea, to give more ballast if needed; that is, if it was found the ship was becoming too tender,"

on the ground and for the reason that the same is not supported by the evidence, but that the evidence shows on the contrary that it was impracticable and dangerous to fill No. 3 tank at sea.

XII.

Claimant excepts to the following portion of said opinion, and to each and every finding contained therein, to wit:

"It is impossible, from the meager testimony that we have as to the ship's G. M., and the doubtful reliability of the deductions made from the G. M. ascertained at Nagasaki, considering the varying conditions of the ship's load, satisfactorily to determine from the G. M. basis the amount the ship could safely carry on deck,"

on the ground and for the reason that the same is not supported by the evidence.

XIII.

Claimant excepts to the following portion of said opinion, and to each and every finding therein contained, to wit:

"Considered along with the testimony of the surveyors and other witnesses of experience in loading vessels, I am drawn irresistibly to the conclusion that, by proper loading, the 'Saigon Maru'

(Claimant's Exceptions.)

could have carried 550,000 feet of lumber on her deck, with reasonable safety, in view of the voyage contemplated,"

on the ground and for the reason that the same is not supported by the evidence.

XIV.

Claimant excepts to the following portion of said opinion, and to each and every finding therein contained, to wit:

"But obviously he was unduly timid, and committed an error in judgment,"

on the ground and for the reason that the same is not supported by the evidence.

XV.

Claimant excepts to the following portion of the said opinion, and to each and every finding therein contained, to wit:

"It was explained that 'we conform to contents' means 'we accept your offer.' That was the contract finally with Gillanders, Arbuthnot & Co. All these cables were based on the ADNECI schedule,"

on the ground and for the reason that none of the same are supported by the evidence.

XVI.

Claimant excepts to the following portion of said opinion, and to each and every finding therein contained, to wit:

"It is a feature in the present case, that owing

(Claimant's Exceptions.)

to war conditions, libelant was practically unable, at the time of default, to procure transportation to carry to Bombay the lumber left behind. If it could have been procured at all, it would have been at very greatly increased cost, and, if libelant had resorted to that means of invoking the general rule, the claimant would have suffered beyond what would seem to be reasonable damages," on the ground and for the reason that the same is not supported by the evidence.

XVII.

Claimant excepts to the following portion of the said opinion, and to each and every finding therein contained, to wit:

"The facts disclose that claimant had practical knowledge that libelant was negotiating for a sale of the cargo, or at least a part of it, in Bombay, when negotiations for the charter party were under way,"

on the ground that the same is not supported by the evidence.

XVIII.

Claimant excepts to the following portion of the said opinion, and to each and every finding therein contained, to wit:

"The contract with Gillanders, Arbuthnot & Co. was closed on the 17th by cable, dispatched at the hour of 5:30 P. M., and the negotiations with Orrett for the charter party were closed on the

(Claimant's Exceptions.)

same day by dispatch forwarded at the hour of 10 A. M.,"

on the ground and for the reason that the same are not supported by the evidence and particularly on the ground that the testimony shows that the contract with Gillanders, Arbuthnot & Co. was not closed until after March 21st.

XIX.

Claimant excepts to the following portion of said opinion, and to each and every finding therein contained, to wit:

"It cannot alter the case that libellant closed with claimant a few hours previous to closing with correspondents at Bombay. The fact remains that claimant had full knowledge of libellant's purpose in securing the charter party, and entered into the charter party with a view of enabling libellant to further, and even to consummate that purpose," on the ground and for the reason that the same are not supported by the evidence.

XX.

Claimant excepts to the following portions of said opinion, and to each and every finding therein contained, to wit:

"Nor was it essential, under the authorities, that claimant should have been advised of the exact conditions of the contract of sale to Gillanders, Arbuthnot & Co. It was sufficient that it had knowledge of the fact that such a sale was in

(Claimant's Exceptions.)

contemplation, dependent upon securing the charter party,"

on the ground and for the reason that the same is not supported by law.

XXI.

Claimant excepts to the following portion of the said opinion, and to each and every finding therein contained, to wit:

"The loss sustained was at the rate of \$7.955 per thousand. I take this from Mr. Wheelwright's statement, which stands uncontradicted. The amount of lumber which claimant failed to carry is 308,441 feet, making the damages \$2453.65. This seems a fair adjustment under the conditions prevailing,"

on the ground and for the reason that none of said findings is supported by the evidence or the laws.

XXII.

Claimant excepts to the following portion of the said opinion, and to each and every finding therein contained, to wit:

"But it is a sufficient answer to this that the lumber was purchased for the "Saigon Maru's" cargo, and the rate of loss named was the actual damage sustained by the claimant's failure to carry. Such were the damages that were legally in the contemplation of the parties when the charter party was entered into,"

(Claimant's Exceptions.)

on the ground and for the reason that none of the same is supported by the evidence or the law.

XXIII.

Claimant excepts to the following portion of the said opinion, and to each and every finding therein contained, to wit:

"But the same (meaning Gilanders' damage against libelant) have been liquidated, and there can be no question as to libelant's liability to pay them. These damages have been ascertained at Bombay—one item of 1075 pounds sterling and another at 4550 rupees. These are the damages for which claimant, or rather, the 'Saigon Maru' is liable to libelant under the second head,"

on the ground that the same are not supported by the evidence or the law.

XXIV.

Claimant excepts to the following portion of the said opinion, and to each and every finding therein contained, to wit:

"But it is apparent that they (meaning Gilander's claim for damages against libelant) come within the general principles governing as above ascertained,"

on the ground and for the reason that none of the same are supported by the law.

XXV.

Claimant excepts to the following portion of

(Claimant's Exceptions.)

said opinion, and to each and every finding therein contained, to wit:

"The English statute alluded to in the evidence and argument can have no bearing on the present issues, especially as it has been repealed," on the ground and for the reason that none of the same is supported by the law.

XXVI.

Claimant excepts to the following portion of said opinion, and to each and every finding therein contained, to wit:

"I have reviewed the authorities presented on exceptions to the libel, and now again insisted upon, whereby the sufficiency of the libel is challenged, but am constrained to adhere to my former ruling,"

on the ground and for the reason that none of the same are supported by the evidence or the law.

XXVII.

Claimant excepts to the following portion of said opinion, and to each and every finding therein contained, to wit:

"The claims for damages as here ascertained will bear interest at the lawful rate of six per cent per annum from August 2, 1917, and libelant will recover its proper costs and disbursements,"

(Claimant's Exceptions.)

on the ground and for the reason that none of the same are supported by the evidence or the law.

FRANK A. HUFFER,

and

HUFFER & HAYDEN,

Proctors for Claimant.

Notice of presentation of the foregoing exceptions waived.

M. M. MATTHIESSEN,

Proctor for Libelant.

The foregoing exceptions, and each of them, were, after due and timely notice to proctors for libelant, and prior to the signing of the decree herein, presented to the court, libelant's proctor appearing and waiving notice of the presentation and hearing of the same, and the court having considered said exceptions, it is now ordered that they and each of them be, and they are hereby overruled, to each of which rulings claimant excepts and its exceptions are allowed.

Dated this 4th day of October, 1920.

CHAS. E. WOLVERTON,

United States District Judge.

Filed Oct. 4, 1920, at 2:30 P. M., G. H. Marsh, Clerk.

And afterwards, to wit, on Monday, the 4th day of October, 1920, at 2:40 p. m., the same being the 79th judicial day of the regular July term of said court; present the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

DECREE.

*In the District Court of the United States for the
District of Oregon.*

IN ADMIRALTY—No. 7467.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, furniture, etc.,

PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libelant,

OSAKA SHOSEN KAISHA, a corporation,

Claimant.

This cause came on regularly for trial on the 12th day of December, 1919, before the Honorable Charles E. Wolverton, one of the judges of the above entitled court, sitting in admiralty. Libelant was represented by its proctors, Wood, Montague & Matthiessen, while the claimant was represented by its proctors, Huffer & Hayden.

The court having heard and considered the evidence adduced by the respective parties hereto, to-

gether with the arguments of their counsel respectively and having heretofore rendered and caused to be filed a written opinion herein in favor of the libelant; and

It appearing to the court that the above named vessel, the "Saigon Maru," was on the 4th day of June, 1917, attached pursuant to monition issued herein and thereafter on said day released upon a stipulation executed by said claimant and the United States Fidelity & Guaranty Company, conditioned that the claimant should abide by and pay the money awarded by the final decree rendered in the cause by this court or, in case of appeal, by the appellate court; and

It further appearing to the court that the libelant is entitled to the relief hereinafter set forth;

Now, therefore, it is hereby considered, ordered, adjudged and decreed, that the libelant, Pacific Export Lumber Company, an Oregon corporation, have and recover, for the causes mentioned in its amended libel herein, the following sums, namely: \$2453.65, with interest thereon at the rate of six per cent per annum from August 2, 1917, for and on account of loss of profits suffered by libelant, and the further sum of \$5192.86 for and on account of the claim for damages against libelant by Gillanders, Arbuthnot & Co. (being the sum of 1075 English pounds sterling at the exchange rate of \$3.48 $\frac{1}{4}$ each and 4550 Indian rupees at the exchange rate of 31.85 cents), together with interest thereon at the rate of six per centum per

annum from August 2, 1917, and its costs and disbursements herein to be taxed.

It is further considered, ordered, adjudged and decreed that the above named Osaka Shosen Kaisha, claimant, and United States Fidelity & Guaranty Company, as stipulator for costs and to abide the decree on the part of said claimant, cause the engagements of their stipulation to be performed or show cause, within ten days after notice of the entry of this decree, why the execution should not issue forthwith against their goods, chattels, and lands in satisfaction thereof, and that service of a copy of this decree upon Huffer & Hayden, as proctors for the claimant and upon Douglas R. Tate, as agent for the stipulator, shall be sufficient notice of this decree and of its entry.

The claimant excepts to the foregoing decree and to each and every finding and adjudication therein, and its exceptions are hereby allowed.

Done in open court this 4th day of October, 1920.

CHARLES E. WOLVERTON,
District Judge.

Filed October 4, 1920, 2:40 P. M. G. H. Marsh, Clerk.

And afterwards, to wit, on the 7th day of October, 1920, there was duly filed in said court Notice of Entry of Decree with acceptance of service thereof, in words and figures, as follows, to wit:

NOTICE OF ENTRY OF DECREE.

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, furniture, etc.,

PACIFIC EXPORT LUMBER COMPANY, a cor-
poration,

Libelant,

OSAKA SHOSEN KAISHA, a corporation,

Claimant.

To United States Fidelity & Guaranty Company and
to its Representative, Douglas R. Tate, esquire,
and to said Claimant:

You and each of you will please take notice that
on Monday, the 4th day of October, 1920, there was
duly entered of record in the above entitled court
and cause a decree, of which a certified copy is at-
tached to your copy of this notice, and that service
thereof is made upon you pursuant to and in com-
pliance with the terms of said decree.

Dated this 5th day of October, 1920.

WOOD, MONTAGUE & MATTHIESEN,

Proctors for Libelant.

Service of the within Notice of Entry of Decree and of decree by certified copy, at Portland, Oregon, is hereby admitted this 5th day of October, 1920.

DOUGLAS R. TATE,
HUFFER & HAYDEN,

By F. A. Huffer,
Proctors for Claimant.

Filed October 7, 1920. G. H. Marsh, Clerk.

And afterwards, to wit, on the 25th day of October, 1920, there was duly filed in said Court, Libellant's Motion for Summary Judgment and Affidavit in support thereof, in words and figures as follows, to wit:

MOTION FOR SUMMARY JUDGMENT.

*In the District Court of the United States for the
District of Oregon.*

IN ADMIRALTY.

No. 7467.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, furniture, etc.,

PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libellant,

OSAKA SHOSEN KAISHA, a corporation,

Claimant.

Comes now libellant by its proctors, Wood, Montague & Matthiesen, and, based upon the annexed

affidavit of M. M. Matthiesen, moves this court for a summary judgment against the stipulators in the above entitled court and cause.

WOOD, MONTAGUE & MATTHIESEN,

Proctors for Libelant.

Filed Oct. 25, 1920, G. H. Marsh, Clerk.

AFFIDAVIT OF M. M. MATTHIESEN.

*In the District Court of the United States for the
District of Oregon.*

IN ADMIRALTY.

No. 7467.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, furniture, etc.,

PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libelant,

OSAKA SHOSEN KAISHA, a corporation,

Claimant.

DISTRICT OF OREGON, ss.

M. M. Matthiessen, being first duly sworn, says that he is and at and during all the times herein mentioned was of legal age and one of the proctors of the libelant herein; that a final decree in favor of the libelant was entered herein on the 4th day of October, 1920, and that a copy of said decree, together with notice of its entry, were on October 5th, 1920, served upon Messrs. Huffer and Hayden, proctors for the claimant, and upon Douglas R. Tate, as

agent for United States Fidelity & Guaranty Company, the stipulator for costs and to abide the decree, which said final decree contained an order that said stipulator for costs and to abide the decree should cause the engagement of its stipulation to be performed or show cause within ten days after notice of the entry of said decree why execution should not issue against the stipulator, its goods, chattels and lands; that said decree has not been satisfied in whole or in part; that no appeal has been taken by claimant; that more than ten days have elapsed since service upon claimant's proctors and upon said Douglas R. Tate of a copy of said final decree with notice of its entry; that no cause has been shown why execution should not issue in accordance with the provisions of said final decree.

M. M. MATTHIESEN.

Subscribed and sworn to before me this 25th day of October, 1920.

M. COLPITTS,

[Notarial Seal.]

Notary Public for Oregon.

My commission expires Jan. 8, 1921.

Filed Oct. 25, 1920. G. H. Marsh, Clerk.

And afterwards, to-wit, on Monday, the 25th day of October, 1920, the same being the 97th Judicial Day of the regular July term of said court; present the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

SUMMARY JUDGMENT AGAINST
STIPULATOR.

*In the District Court of the United States for the
District of Oregon.*

IN ADMIRALTY.

No. 7467.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, furniture, etc.,

PACIFIC EXPORT LUMBER COMPANY, a cor-
poration,

Libelant,

OSAKA SHOSEN KAISHA, a corporation,

Claimant.

A final decree having been entered in the above entitled cause on the 4th day of October, 1920, wherein it was ordered that, unless said decree be satisfied, the stipulator for costs and to abide the decree should cause the engagement of its stipulation to be performed or show cause within ten days from the date of the service of a copy of said decree on claimant's proctors, with notice of its entry, and upon Douglas R. Tate, agent for said stipulator, why execution should not issue against said stipulator, its goods, chattels and lands; and

It appearing to the court that said decree has not been satisfied, that no appeal has been taken by the claimant, and that more than ten days have elapsed since service of said decree with notice of its entry upon proctors for claimant and upon the agent for

said stipulator, and that no cause has been shown why execution should not issue as aforesaid, all of which appears by the affidavit of M. M. Matthiessen, one of libelant's proctors, verified October 25th, 1920.

Now, therefore, it is ordered, adjudged and decreed, on motion of Wood, Montague & Matthiessen, proctors for libelant, that a summary judgment be and the same hereby is entered against Osaka Shosen Kaisha, the claimant, and United States Fidelity & Guaranty Company, as stipulator, and each of them, for the sum of \$2453.65, with interest thereon at the rate of six per cent, per annum from August 2, 1917, and the further sum of \$5192.86 for and on account of the claim for damages against libelant by Gillanders, Arbuthnot & Co., together with interest thereon at the rate of six per cent. per annum from August 2, 1917, and for its costs and disbursements herein taxed at \$——, and that libelant have execution thereon to satisfy this decree.

To this judgment and every part thereof, claimant and Surety Company, stipulator, except and their exceptions are allowed. .

Dated this 25th day of October, 1920.

CHAS. E. WOLVERTON,
District Judge.

Filed Oct. 25, 1920. G. H. Marsh, Clerk.

And afterwards, to wit, on the 27th day of October, 1920, there was duly filed in said Court, Claimant's Notice of Filing Final Decree and Judgment in words and figures as follows, to wit:

NOTICE OF FILING DECREE AND JUDGMENT

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libelant,

vs.

**THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.,**

Respondent,

**OSAKA SHOSEN KAISHA, a corporation of
Japan,**

Claimant.

To Pacific Export Lumber Company, the above named Libelant, and Erskine Wood, and Wood, Montague & Matthiessen, its Proctors:

You, and each of you, will please take notice that the decree of the above entitled court in the above entitled cause was made and filed herein on the 4th

day of October, 1920, and that the summary judgment herein against the Osaka Shosen Kaisha, the above named claimant, and United States Fidelity & Guaranty Company, was made and filed herein on the 25th day of October, 1920.

Dated at Portland, Oregon, October 26th, 1920.

FRANK A. HUFFER and
HUFFER & HAYDEN,

Proctors for said Osaka Shosen Kaisha and said United States Fidelity & Guaranty Company.

Due service of the foregoing notice and said Decree and Judgment, and receipt of copies thereof admitted this 26th day of October, 1920.

ERSKINE WOOD,
WOOD, MONTAGUE & MATTHIESSEN,
M. M. MATTHIESSEN,

Proctors for Pacific Export Lumber Company,
the above named Libelant.

Filed Oct. 27, 1920. G. H. Marsh, Clerk

And afterwards, to wit, on the 27th day of October, 1920, there was duly filed in said Court, Notice of Appeal With Admission of Service Thereof, in words and figures as follows, to wit:

NOTICE OF APPEAL.

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libelant,

vs.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.,

Respondent,

OSAKA SHOSEN KAISHA, a corporation of
Japan,

Claimant.

To Pacific Export Lumber Company, a corporation,
the above named Libelant and Erskine Wood,
and Wood, Montague & Matthiessen, Proctors
for said Libelant, and to the Clerk of the above
entitled Court:

You, and each of you, will please take notice that
Osaka Shosen Kaisha, a corporation, the above
named claimant of the said Japanese steamer "Sai-
gon Maru," her tackle, apparel, furniture, etc., and
the principal in the stipulations herein for costs and
to abide by and pay the final decree in this cause,
and United States Fidelity & Guaranty Company,
a corporation, the surety in said stipulations, and

each of them, hereby appeal from the decree made and entered herein in favor of libelant on the 4th day of October, 1920, and from each and every part of said decree, and also from the summary judgment entered herein on the 25th day of October, 1920, in favor of libelant and against said Osaka Shosen Kaisha and said United States Fidelity & Guaranty Company, and from each and every part of said decree and of said judgment to the next United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Portland, Oregon, this 27th day of October, 1920.

FRANK A. HUFFER and
HUFFER & HAYDEN,

Proctors for said Osaka Shosen Kaisha and said United States Fidelity & Guaranty Company.

Service of the foregoing notice of appeal and receipt of a copy of said notice after the filing of the same in the office of the clerk of the above entitled court is hereby admitted this 27th day of October, 1920.

ERSKINE WOOD,
WOOD, MONTAGUE & MATTHIESSEN,

Proctors for Pacific Export Lumber Company,
the above named Libelant.

Filed Oct. 27, 1920. G. H. Marsh, Clerk.

And afterwards, to-wit, on Wednesday, the 27th day of October, 1920, the same being the 99th Judicial day of the regular July term of said Court; present the Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

ORDER FIXING THE AMOUNT OF BOND ON
APPEAL, STAYING EXECUTION.

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libelant,

vs.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.,

Respondent,

OSAKA SHOSEN KAISHA, a corporation of
Japan,

Claimant.

A decree having been signed and entered in the above entitled cause by the above entitled court on the 4th day of October, 1920, wherein and whereby it was ordered and adjudged and decreed that the above named libelant, Pacific Export Lumber Company, have and recover for the causes mentioned in its amended libel herein, the sum of \$2453.65 with

interest thereon at the rate of six per cent per annum from August 2, 1917, for and on account of loss of profits suffered by libelant, and the further sum of \$5192.86, for and on account of a certain claim for damages against libelant by Gillanders, Arbuthnot & Company, together with interest at the rate of six per cent per annum from August 2, 1917, and libelant's costs and disbursements therein to be taxed, and further, that the Osaka Shosen Kaisha, claimant, and United States Fidelity & Guaranty Company, as stipulator for costs and to abide the decree herein cause the engagements of their stipulation to be performed, or show cause within ten days after notice of the entry of said decree why execution should not issue forthwith against their goods, chattels and lands in satisfaction thereof, and a summary judgment having hereafter, to wit, on the 25th day of October, 1920, been signed and entered by this court against said Osaka Shosen Kaisha and said United States Fidelity & Guaranty Company for the amount specified in said decree, and adjudging that libelant have execution thereon to satisfy said decree; and the said claimant, Osaka Shosen Kaisha, and said United States Fidelity & Guaranty Company, having taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit by filing in the office of the clerk of the above entitled court and serving on the proctors for the adverse party in said cause, a notice signed by them that they appealed to the United States Circuit Court of Appeals for the Ninth

Circuit from the said decree and said summary judgment, and from each and every part of each of them, and the said claimant, Osaka Shosen Kaisha, and said United States Fidelity & Guaranty Company, desiring to stay execution of the said decree and of said judgment and having by their proctors of record moved this court to fix by order the amount of the bond which they should file as a bond for the costs on said appeal and as a supersedeas staying execution of said decree and of said judgment, and it appearing that said claimant, Osaka Shosen Kaisha has, heretofore, on the 4th day of June, 1917, filed a bond in said cause in the sum of \$30,000 (reduced by order of Court on October 13, 1919, to \$15,000) for the release of the said steamship "Saigon Maru" and the court being of the opinion that a further bond in the sum of \$10,750.00 in addition to the \$250.00 bond for costs of the appeal, both in one bond for the principal sum of \$11,000.00, is sufficient upon said appeal, as a bond for costs of the appeal and to operate as a supersedeas to stay execution of said decree and of said judgment in the above entitled cause.

Now, it is ordered and decreed that said appeal bond to be given on such appeal be, and the same is hereby fixed at the sum of \$11,000.00, which bond shall operate as a supersedeas bond to stay execution of said decree and of said summary judgment of said District Court as well as a bond for costs of said appeal.

Done in open court this 27th day of October,
1920.

CHAS. E. WOLVERTON,
United States District Judge.

We consent to the entry of the above order.

WOOD, MONTAGUE & MATTHIESSEN,
ERSKINE WOOD,
M. M. MATTHIESSEN,

Proctors for Libelant.

Filed Oct. 27, 1920. G. H. Marsh, Clerk.

And afterwards, to wit, on the 27th day of October,
1920, there was duly filed in said Court, Bond on
Appeal With Acceptance of Service and Endorse-
ments of Approval Thereof, in words and figures
as follows, to-wit:

APPEAL BOND.

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a cor-
poration,

vs.

Libelant,

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.,

Respondent.

OSAKA SHOSEN KAISHA, a corporation of
Japan,

Claimant.

KNOW ALL MEN BY THESE PRESENTS:

That we, Osaka Shosen Kaisha, a Japanese corporation, and United States Fidelity & Guaranty Company, a corporation of the state of Maryland, as principals, and The Aetna Casualty and Surety Company, a corporation duly organized under the laws of the state of Connecticut, and authorized to transact business as surety within the District of Oregon, as surety, are held and firmly bound unto Pacific Export Lumber Company, a corporation, the libelant in the above entitled action in the sum of Eleven Thousand and no/100 Dollars (\$11,000.00) to be paid to the said Pacific Export Lumber Company, a corporation, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Portland, Oregon, this 26th day of October, 1920.

The condition of this obligation is such that whereas the said Osaka Shosen Kaisha and the said United States Fidelity & Guaranty Company, the above named principals, have appealed to the next United States Circuit Court of Appeals for the Ninth Circuit from the decree in favor of the said Pacific Export Lumber Company, made and entered in the District Court of the United States for the District of Oregon on the 4th day of October, 1920, and from that summary judgment made and entered in said court and cause in favor of libelant and against said principals on the 25th day of October,

1920; and, whereas, the undersigned principals desire, during the progress of said appeal, to stay the execution of the said decree and of the said judgment of the said District Court; and, whereas, the said Court has heretofore fixed the amount of the bond on said appeal at \$11,000.00, to operate as the \$250.00 bond for costs of the appeal and as a bond staying execution of said decree and of said judgment pending appeal herein and the parties hereto are executing this bond accordingly;

Now, therefore, the condition of this obligation is such that if the above named and undersigned principals, the said Osaka Shosen Kaisha and the said United States Fidelity & Guaranty Company, the appellants in said cause and the principals herein, shall prosecute said appeal to effect and pay all costs which may be awarded against them or either of them as such appellants or appellant, if the appeal is not sustained, and abide by and perform whatever decree may be rendered by the said United States Circuit Court of Appeals for the Ninth Circuit in this cause, or, on the mandate of said court, by the said United States District Court, then this obligation shall be void; otherwise, the same shall be and remain in full force and effect.

Dated this 26th day of October, 1920.

OSAKA SHOSEN KAISHA,

By Frank A. Huffer and Huffer & Hayden, By
F. A. Huffer, Its Proctors.

**UNITED STATES FIDELITY & GUARANTY
COMPANY,**

By Frank A. Huffer and Huffer & Hayden, By
F. A. Huffer, Its Proctors.

PRINCIPALS.

**THE AETNA CASUALTY AND SURETY COM-
PANY,**

SURETY.

By Walter E. Pearson, Res. Vice Pres.

Attest: G. E. Thatcher, Res. Ass't Sec'y.

(Seal)

Taken, acknowledged, sealed and delivered be-
fore me this 26th day of October, 1920.

(Seal)

W. A. EKWALL,

Notary Public in and for the State of Oregon, re-
siding at Portland. My commission expires July 12,
1924.

The foregoing bond is approved as to form,
amount and sufficiency of surety and receipt of a
copy of said bond is acknowledged on this 27th day
of October, 1920.

WOOD, MONTAGUE & MATTHIESSEN,
ERSKINE WOOD,

M. M. MATTHIESSEN,

Proctors for Pacific Export Lumber Company.

The foregoing bond and the sufficiency of the surety thereon is on this 27th day of October, 1920, approved as a bond for costs of appeal and as a supersedeas bond staying execution of the decree appealed from.

CHAS. E. WOLVERTON,
United States District Judge.

Filed Oct. 27, 1920. G. H. Marsh, Clerk.

And afterwards, to wit, on the 27th day of October, 1920, there was duly filed in said Court, Notice of Filing Bond on Appeal With Acceptance of Service Thereof, in words and figures as follows, to wit:

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libelant,

vs.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.,

Respondent.

OSAKA SHOSEN KAISHA, a corporation of
Japan,

Claimant.

NOTICE OF FILING BOND ON APPEAL.

To Pacific Export Lumber Company, the above named Libelant and Erskine Wood and Wood, Montague & Matthiessen, its Proctors:

You and each of you will please take notice that on the 27th day of October, 1920, the Osaka Shosen Kaisha, a corporation, and United States Fidelity & Guaranty Company, a corporation, the appellants herein, filed in the office of the clerk of the United States District Court for the District of Oregon, at Portland, Oregon, a bond herein in the amount of \$11,000.00 to operate as a bond for costs of the appeal in the amount of \$250.00, and as a supersedeas bond to stay execution of the decree and the judgment appealed from herein, pursuant to an order of the above entitled court, a copy of which bond is herewith served upon you. You are further notified that the name of the surety upon said bond is The Aetna Casualty and Surety Company, whose home office is in the city of Hartford, state of Connecticut, and its principal place of business in the state of Oregon is at the city of Portland in said state, in which city is has an office and resident agent at Room No. 301, Yeon Building, therein.

Dated at Portland, Oregon, this 27th day of October, 1920.

FRANK A. HUFFER,
HUFFER & HAYDEN,
Proctors for Said Appellants.

Due service of the foregoing notice and of bond therein mentioned, and receipt of copies of said notice and said bond acknowledged at Portland, Oregon, this 27th day of October, 1920, after the filing of the said bond.

ERSKINE WOOD,
WOOD, MONTAGUE & MATTHIESSEN,
Proctors for Libelant.

Filed Oct. 27, 1920, G. H. Marsh, Clerk.

And afterwards, to wit, on the 27th day of October, 1920, there was duly filed in said Court, Assignments of Error With Admission of Service Thereof, in words and figures as follows, to wit:

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libelant,

vs.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.,

Respondent.

OSAKA SHOSEN KAISHA, a corporation of
Japan,

Claimant.

ASSIGNMENTS OF ERROR.

The appellants, Osaka Shosen Kaisha, a corporation, and United States Fidelity & Guaranty Company, a corporation, principal and surety respectively in claimant's stipulations for costs and to abide the decree herein, and each of them, assign errors in the rulings and proceedings of the District Court herein as follows:

I.

The court erred in overruling claimant's exceptions to the libel herein and in making the order of September 17, 1917, overruling said exceptions.

II.

The court erred in overruling the claimant's exceptions to the amended libel herein and in making the order of December 1, 1919, overruling said exceptions.

III.

The court erred in holding that the "Saigon Maru" was liable in rem for the alleged breach of the charter-party mentioned in the libel and amended libel herein.

IV.

The court erred in holding that the taking and receiving on board of the lumber that was actually carried was such part performance of the charter-party contract as to make the vessel liable in rem for refusal to carry any additional quantity of lumber required by the terms of the charter-party to be carried, and to take the case out of the general rule

(Assignments of Error.)

that a vessel is not liable in rem for the breach of an executory contract of affreightment.

V.

The court erred in holding that the doing of any act by said vessel evidenciary of the fact of entering upon the performance of the charter-party contract was such part performance thereof as to make the vessel liable in rem for failure to receive on board and carry any quantity of lumber additional to that which was actually carried and which was required of the charter-party to be carried.

VI.

The court erred in refusing to enter a decree dismissing the libel and awarding claimant its costs and disbursements in this action.

VII.

The court erred in entering the judgment and decree of the date of October 4, 1920.

VIII.

The court erred in ordering, adjudging and decreeing that libelant have and recover for the causes mentioned in its amended libel the sum of \$2453.65, with interest thereon at the rate of six per cent (6%) per annum from August 2, 1917 for and on account of loss of profits suffered by libelant, and erred in ordering, adjudging and decreeing recovery for any amount whatsoever on account of loss of profits.

(Assignments of Error.)

IX.

The court erred in finding and holding that the loss of profits sustained by libelant was at the rate of \$7.955 per thousand feet.

X.

That in calculating the loss of profits sustained by libelant the court erred in taking as a basis for the calculation the price actually paid by libelant in March, 1917, instead of the market value at Portland, Oregon, on August 2, 1917, the date when the left behind lumber would have arrived at Bombay.

XI.

That in calculating the amount of libelant's alleged loss of profits the court erred in taking as a basis the price actually paid by libelant for the lumber in question in March, 1917.

XII.

That in calculating the amount of libelant's alleged loss of profits the court erred in not using as a basis for its calculations the market price of the lumber in question prevailing in Portland, Oregon, on August 2, 1917, the date the same would have arrived in Bombay.

XIII.

The court erred in ordering, adjudging and decreeing that libelant have and recover the sum of \$5192.86 for and on account of the claim for damages against libelant by Gillanders, Arbuthnot & Company, together with interest thereon at the rate

(Assignments of Error.)

of six per cent (6%) per annum from August 2, 1917 and in ordering, adjudging and decreeing recovery in favor of libelant for said damages in any sum whatsoever.

XIV.

The court erred in finding and holding that libelant was bound by any contract of sale of the lumber in question to said firm of Gillanders, Arbuthnot & Company.

XV.

The court erred in finding and holding that at the time of the execution of the charter-party any sale of said lumber to Gillanders, Arbuthnot & Company, or anyone else, was in contemplation of the parties thereto.

XVI.

The court erred in not finding and holding that the said claim for damages against libelant by Gillanders, Arbuthnot & Company was too remote, speculative, indefinite and uncertain for recovery herein by libelant, and not within the contemplation of the parties at the time of the charter-party.

XVII.

The court erred in adjudging and decreeing that libelant have and recover its costs and disbursements herein.

XVIII.

The court erred in ordering, adjudging and decreeing that the Osaka Shosen Kaisha, claimant,

(Assignments of Error.)

and United States Fidelity & Guaranty Company, as stipulator for costs and to abide the decree, cause the engagements of their stipulations to be performed or show cause within ten days after notice of the entry of the said decree of October 4, 1920, why execution should not issue forthwith against their lands, goods, and chattels in satisfaction thereof.

XIX.

The court erred in making the following finding and holding contained in its opinion of August 16, 1920, to-wit:

"These steering rods, as described by the captain, run about two inches outside the lumber stanchions, being timbers 6x12 to 8x12, by which the deck-load was secured to the ship. The witnesses for libelant place the rods at a greater distance. For instance, Genereaux says that, 'if the deck-load had been continued, it could have been kept two feet away from the steering rods without any trouble whatsoever.'"

XX.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"Without attempting to discuss further the evidence bearing upon the objection to carrying a larger deck-load because of the arrangement of the steering rods, I am firmly persuaded, from a careful survey of the whole testimony, that it is without potency or force."

(Assignments of Error.)

XXI.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"It furthermore appears that, when the vessel reached Bombay, she had on board 500 tons of coal, making her consumption less on a distance of about 200 miles greater than from Portland to Nagasaki. It is to be remembered that her voyage between the latter ports was through comparatively smooth seas, and without unusual incident, and the consumption of coal should at least have been no greater than from Nagasaki to Bombay."

XXII.

The court erred in making the following finding and holding contained in said opinion, to wit:

"He had, however, scarcely any practical experience in navigating ships with deck-loads of lumber cargo. As to the anticipated typhoons and his dread of the monsoon, I am impelled to the view that he has very greatly exaggerated their terror to seamen."

XXIII.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"Furthermore, the mariner, perhaps universally, has 24 hours' notice of the coming of a typhoon, and is enabled thereby to avoid its disastrous effects. He may of necessity encounter at times the heavy seas and storms that result from cyclonic conditions, but

(Assignments of Error.)

rarely the central disturbance that is so fatal to navigation. These resulting disturbances are perhaps no greater, nor more to be dreaded than the seas elsewhere, where navigation is constantly under way."

XXIV.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"As to the monsoon, it would seem to be not so perilous as Yamamoto was constrained to believe. It consists of a steady, southwesterly wind, only occasionally of violent proportions, which continue for a considerable time, and blows up what is termed a 'short chop' of sea swell."

XXV.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"By the time, however, the vessel arrived at this first lap of the voyage, the deck-load would have so settled and been drawn together by its lashings, that a sag could hardly be expected in such proportions as to give trouble."

XXVI.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"The coal required to carry the vessel to Nagasaki was 832 tons plus 25 per cent to meet emergencies, making a total of 1040 tons. The ship carried from 1210 to 1220 tons, an excess of from 170

(Assignments of Error.)

to 180 tons. That amount in tonnage of lumber could have been carried on deck in place of the coal."

XXVII.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"Furthermore, Yamaguchi was of the opinion that the vessel could have carried 60 tons more on deck than she did carry."

XXVIII.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"As to the water ballast, it is obvious that, while it seems to be necessary to carry the trimming tanks full on account of their construction, to prevent the water from flowing from one side of the ship to the other, and thus add to the stability of the ship in navigation, No. 3 of the fresh water tanks could have been filled at sea, to give more ballast if needed; that is, if it was found the ship was becoming too tender."

XXIX.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"It is impossible, from the meager testimony that we have as to the ship's G. M., and the doubtful reliability of the deductions made from the G. M. ascertained at Nagasaki, considering the varying conditions of the ship's load, satisfactorily to deter-

(Assignments of Error.)

mine from the G. M. basis the amount the ship could safely carry on deck."

XXX.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"Considered along with the testimony of the surveyors and other witnesses of experience in loading vessels, I am drawn irresistibly to the conclusion that, by proper loading, the 'Saigon Maru' could have carried 550,000 feet of lumber on her deck, with reasonable safety, in view of the voyage contemplated."

XXXI.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"But obviously, he, Captain Y. Yamamoto, was unduly timid, and committed an error in judgment."

XXXII.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"It was explained that 'we conform to contents' means 'we accept your offer'. That was the contract finally with Gillanders, Arbuthnot & Company. All these cables were based upon the Adneci schedule."

XXXIII.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"It is a feature in the present case, that owing to war conditions, libellant was practically unable,

(Assignments of Error.)

at the time of default, to procure transportation to carry to Bombay the lumber left behind. If it could have been procured at all, it would have been at very greatly increased cost, and, if libelant had resorted to that means of invoking the general rule, the claimant would have suffered beyond what would seem to be reasonable damage."

XXXIV.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"The facts disclosed that claimant had practical knowledge that libelant was negotiating for a sale of the cargo, or at least a part of it, in Bombay, when negotiations for the charter-party were under way."

XXXV.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"The contract with Gillanders, Arbuthnot & Co., was closed on the 17th by cable, dispatched at the hour of 5:30 P. M., and the negotiations with Orrett for the charter-party were closed on the same day by dispatch forwarded at the hour of 10 A. M."

XXXVI.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"It cannot alter the fact that libelant closed with claimant a few hours previous to closing with correspondents at Bombay. The fact remains that

(Assignments of Error.)

claimant had full knowledge of libelant's purpose in securing the charter-party, and entered into the charter-party with a view of enabling libelant to further, and even to consummate that purpose."

XXXVII.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"Nor was it essential, under the authorities, that claimant should have been advised of the exact conditions of the contract of sale to Gillanders, Arbuthnot & Co. It was sufficient that it had knowledge of the fact that such a sale was in contemplation, dependent upon securing the charter-party."

XXXVIII.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"The loss sustained was at the rate of \$7.955 per thousand. I take this from Mr. Wheelwright's statement which stands uncontradicted. The amount of lumber which claimant failed to carry is 308,441 feet, making the damages \$2453.65. This seems a fair adjustment under the conditions prevailing."

XXXIX.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"But it is a sufficient answer to this that the lumber was purchased for the 'Saigon Maru's' cargo, and the rate of loss named was the actual damage

(Assignments of Error.)

sustained by the claimant's failure to carry. Such were the damages that were legally in the contemplation of the parties when the charter-party was entered into."

XL.

"The court erred in making the following finding and holding contained in said opinion, to-wit:

"But the same, (meaning Gillanders' damage against libelant) have been liquidated, and there can be no question as to libelant's liability to pay them. These damages have been ascertained at Bombay—one item of 1075 pounds sterling and another at 4550 rupees. These are the damages for which claimant, or rather, the 'Saigon Maru', is liable under the second head."

XLI.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"But it is apparent that they (meaning Gillanders' claim for damages against libelant) come within the general principles governing as above ascertained."

XLII.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"I have reviewed the authorities presented on exceptions to the libel, and now again insisted upon, whereby the sufficiency of the libel is challenged, but am constrained to adhere to my former ruling."

(Assignments of Error.)

XLIII.

The court erred in making the following finding and holding contained in said opinion, to-wit:

"The claims for damages as here ascertained will bear interest at the lawful rate of six per cent per annum from August 2, 1917, and libelant will recover its proper costs and disbursements."

XLIV.

The court erred in admitting in evidence the list of eleven ships, "libelant's Exhibit K" purporting to show their tonnage and dimensions and the cargoes of lumber carried by them respectively and in making its decision, considering four of the vessels in said list as to the tonnage and dimensions thereof and the amount of lumber deck cargo carried by them respectively.

XLV.

The court erred in admitting in evidence and, in making its decision, considering the statement of William D. Wheelwright of the date of October 4, 1919, being "libelant's Exhibit L".

XLVI.

The court erred in admitting in evidence and, in making its decision, considering the invoice of the lumber claimed to have been purchased by libelant from the Inman-Paulson Lumber Company in March, 1917, being "Libelant's Exhibit P."

XLVII.

The court erred in disregarding the opinion of

(Assignments of Error.)

Captain Y. Yamamoto, the master of the "Saigon Maru" at the time of her loading as to the maximum amount of deck-load said vessel could carry in safety on the contemplated voyage, and in substituting the court's own judgment as to the maximum amount of deck-load on face of the fact that said Captain Y. Yamamoto was shown to be competent and to have been thoroughly acquainted with his own vessel, and of the further fact that the court in his opinion deciding this case, expressly held that said captain, in coming to said conclusion as to the maximum deck-load, did so "all in good faith on his part".

XLVIII.

The court erred in rendering the summary judgment entered herein on the 25th day of October, 1920.

XLIX.

The court erred in adjudging and decreeing in and by said summary judgment of October 25, 1920, that libellant have and recover of and from the said Osaka Shosen Kaisha and the said United States Fidelity and Guaranty Company, or either of them, the sum of \$2453.65, with interest thereon at 6% per annum from August 2, 1917, and the further sum of \$5192.86 for and on account of the claim for damages by Gillanders, Arbuthnot and Company, together with interest thereon at the rate of 6% per annum from August 2, 1917, and for costs.

(Assignments of Error.)

L.

The court erred in adjudging in and by said judgment of October 25, 1920, that libelant have and recover its costs from the said Osaka Shosen Kaisha, and the said United States Fidelity and Guaranty Company, or either of them.

LI.

The court erred in ordering and adjudging in and by said judgment of October 25, 1920, that libelant have and recover of and from the said Osaka Shosen Kaisha and said United States Fidelity & Guaranty Company, or either of them, the sum therein stated of \$2453.65, with interest thereon at 6% per annum from August 2, 1917.

LII.

The court erred in ordering and adjudging in and by its said judgment of October 25, 1920, that libelant have and recover of and from said Osaka Shosen Kaisha and said United States Fidelity & Guaranty Company, or either of them, the sum of \$5192.86, for and on account of the claim for damages against libelant by Gillanders, Arbuthnot and Company, together with interest thereon at the rate of 6% per annum from August 2, 1917.

LIII.

The court erred in ordering, adjudging and decreeing in and by said judgment of October 25, 1920, that libelant have execution against said Osaka

(Assignments of Error.)

Shosen Kaisha and said United States Fidelity and Guaranty Company, or either of them.

LIV.

The court erred in overruling claimant's objection to the introduction of any testimony made at the beginning of the trial on the ground that the libel did not state facts sufficient to constitute a cause of action against the vessel or to show any lien against the vessel or to show any right to proceed in rem against it.

Wherefore, appellants, the said Osaka Shosen Kaisha and said United States Fidelity & Guaranty Company, pray the judgment of the United States Circuit Court of Appeals for the Ninth Circuit in the premises and that the decrees and judgments appealed from herein be reversed and that they, and each of them, have and recover their costs and such other and different relief as may be just and equitable.

Dated this 27th day of October, 1920.

FRANK A. HUFFER,
HUFFER & HAYDEN,

Proctors for said Osaka Shosen Kaisha and said United States Fidelity & Guaranty Company.

(Assignments of Error.)

Service of the foregoing assignments of error and receipt of a copy thereof after the filing of said assignments is hereby admitted this 27th day of October, 1920.

WOOD, MONTAGUE & MATTHIESSEN,
ERSKINE WOOD,

Proctors for Libelant.

Filed Oct. 27, 1920. G. H. Marsh, Clerk.

And afterwards, to wit, on the 27th day of October, 1920, there was duly filed in said Court, Citation on Appeal, together with Acceptance of Service thereof, in words and figures as follows, to wit:

CITATION ON APPEAL.

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libelant,

vs.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.,

Respondent,

OSAKA SHOSEN KAISHA, a corporation of
Japan,

Claimant.

UNITED STATES OF AMERICA, }
District of Oregon } ss.

The President of the United States to Pacific Export Lumber Company, the above named Libelant, and to Messrs. Erskine Wood, and Wood, Montague & Matthiessen, its Proctors herein, Greeting:

You, and each of you, are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an appeal to the said Court duly filed in the office of the Clerk of the United States District Court for the District of Oregon, wherein the Osaka Shosen Kaisha, a corporation, and United States Fidelity & Guaranty Company, a corporation, are appellants and you, the said Pacific Export Lumber Company, are appellee, then and there to show cause, if any there be, why the decree of the United States District Court for the District of Oregon, made and entered in the above entitled cause on the 4th day of October, 1920, and also that certain summary judgment in your favor against said appellants, made and entered in the above entitled cause on the 25th day of October, 1920, should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United

State of America, at the city of Portland, Oregon,
this 27th day of October, 1920.

CHAS. E. WOLVERTON,

Judge of the United States District Court for
the District of Oregon.

Service of the foregoing citation and receipt of
a copy thereof, after the filing of the same in the
office of the clerk of the above entitled court, is
hereby admitted this 27th day of October, 1920.

ERSKINE WOOD,

WOOD, MONTAGUE & MATTHIESSEN,

Proctors for Pacific Export Lumber Company,
Libelant and Appellee.

Filed Oct. 27, 1920. G. H. Marsh, Clerk.

And afterwards, to wit, on the 28th day of October,
1920, there was duly filed in said Court, Stipula-
tion and Order As to Record, in words and fig-
ures as follows, to wit:

STIPULATION AND ORDER AS TO RECORD.

*In the District Court of the United States for the
District of Oregon.*

No. 7467.

PACIFIC EXPORT LUMBER COMPANY, a corporation,

Libelant,

vs.

THE JAPANESE STEAMER "SAIGON MARU",
her tackle, apparel, etc.,

Respondent,

OSAKA SHOSEN KAISHA, a corporation of
Japan,

Claimant.

It is hereby stipulated by and between the parties hereto through their respective proctors that the originals of all exhibits introduced in evidence in the above entitled cause, including those introduced in taking the depositions read in evidence in the trial, be sent to the United States Circuit Court of Appeals for the Ninth Circuit with apostles on appeal in lieu of printed copies; excepting, however, Libelant's Exhibit "P" and claimant's Exhibits "G" and "M", which are to be printed.

And it is further stipulated that said apostles shall be transmitted to said Circuit Court of Appeals in printed form pursuant to the Act of February 13, 1911 and shall include the following, to wit:

Libel of Pacific Export Lumber Company, filed June 4, 1917; claimant's stipulations for costs and to abide the decree; amended exceptions to said libel, filed July 2, 1917; opinion of court on said exceptions, filed September 17, 1917; order of court of said date overruling said exceptions; claimant's answer to said libel, filed September 27, 1917; amended libel, filed October 13, 1919; claimant's exceptions to said amended libel, filed October 28, 1919; order of December 1, 1919, overruling claimant's exceptions to said amended libel; claimant's answer to said amended libel, filed December 1, 1919; all the testimony and other proofs adduced in the cause, (but no exhibits, except libelant's Exhibit "P" and claimant's Exhibits "G" and "M", are to be printed); opinion of the court on the merits, filed herein on the 16th day of August, 1920; claimant's exceptions to said opinion, filed herein October 4, 1920; decree entered October 4, 1920; affidavit of M. M. Matthiessen of service of decree on stipulators, filed October 25, 1920; notice of decree and of its entry served on claimant's proctors and Douglas R. Tate with admission of service by each; summary judgment made and entered October 25, 1920; notice of decree and judgment, filed October 27, 1920; notice of appeal with admission of service thereof; order fixing amount of appeal bond; bond on appeal with acceptance of service and endorsements of approval; notice of filing bond on appeal with acceptance of service thereof; citation on appeal with admission of service thereof; assignments of error with admis-

sion of service thereof; and this stipulation and order as to record on appeal; also all matters and things required by the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated Oct. 28, 1920.

ERSKINE WOOD,

WOOD, MONTAGUE & MATTHIESSEN,

Proctors for Pacific Export Lumber Company,
Libelant and Appellee.

FRANK A. HUFFER,

HUFFER & HAYDEN,

Proctors for Appellants, Osaka Shosen Kaisha
and United States Fidelity & Guaranty Company.

Upon reading the foregoing stipulation as to the record on this appeal, it is ordered that said record be prepared and filed in accordance with said stipulation.

Dated, this 28th day of October, 1920.

CHAS. E. WOLVERTON,

United States District Judge.

Filed Oct. 28, 1920. G. H. Marsh, Clerk.

*In the District Court of the United States for
the District of Oregon.*

No. 7467.

STIPULATION AND ORDER AS TO RECORD.

PACIFIC EXPORT LUMBER COMPANY, a cor-
poration, Libelant,

v.

THE JAPANESE STEAMER "SAIGON MARU,"
her tackle, apparel, etc., Respondent,

OSAKA SHOSEN KAISHA, a corporation of
Japan, Claimant.

It is hereby stipulated by the parties hereto by their respective proctors that whereas, on the 28th day of October, 1920, the respective proctors for the parties hereto stipulated and the above named district court made an order directing that the originals of all exhibits introduced in evidence in the above entitled cause be sent up to the United States Circuit Court of Appeals, for the Ninth Circuit with the apostles on appeal in lieu of printed copies, excepting, however, "Libelant's Exhibit P" and claimant's exhibits "G" and "H," which were to be printed, and also specifying the papers, matters and things to be included in the apostles on appeal, and whereas it is desired to modify the directions contained in said stipulation and order.

It is now stipulated and agreed by the proctors for appellants and appellee on said appeal that

the originals of all of the exhibits introduced in evidence in the above entitled cause, including those introduced in taking the depositions, be sent to the United States Circuit Court of Appeals for the Ninth Circuit with the apostles on appeal and that, in addition thereto, all of said exhibits be printed except "Libelant's Exhibit M," "Libelant's Exhibit N," "Libelant's Exhibit R," "Claimant's Exhibit A," "Claimant's Exhibit C," "Claimant's Exhibit D," "Claimant's Exhibit E," "Claimant's Exhibit H," "Claimant's Exhibit I," "Claimant's Exhibit J," "Claimant's Exhibit K," "Claimant's Exhibit I-L," "Claimant's Exhibit Yamamoto No. 1," "Claimant's Exhibit Yamamoto No. 2," "Claimant's Exhibit Yamamoto No. 4," "Claimant's Exhibit Yamamoto No. 5," "Claimant's Exhibit Yamamoto No. 6," "Claimant's Exhibit Yamamoto No. 7," "Claimant's Exhibit Yamamoto No. 8," "Claimant's Exhibit Yamamoto No. 9," "Claimant's Exhibit Yamamoto No. 10," "Claimant's Exhibit Yamamoto No. 11," and "Libelant's Exhibit B Yamamoto" (also marked "Libelant's Exhibit R"), the originals of all of which are to be sent up in lieu of printed copies; that no exhibit printed in the body of the testimony or in connection with any deposition need be reprinted.

And it is further stipulated that in printing said apostles on appeal any and all endorsements on pleadings and other papers on file may be omitted; that, except as herein otherwise provided said stipulation and order of October 28, 1920,

and the directions therein contained are to remain unchanged.

Dated this 20th day of November, 1920.

WOOD, MONTAGUE & MATTHIESSEN,
ERSKINE WOOD,

Proctors for Pacific Export Lumber Company,
Libelant and Appellee.

FRANK A. HUFFER,
HUFFER & HAYDEN,

Proctors for Appellants,
Osaka Shosen Kaisha and United
States Fidelity & Guaranty Co.

Upon reading the foregoing stipulation as to the record on this appeal, it is ordered that said record be prepared and filed in accordance with said stipulation.

Dated this 20th day of November, 1920.

CHAS. E. WOLVERTON,
United States District Judge.

Filed Nov. 22, 1920, G. H. Marsh, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 7467.

ORDER EXTENDING TIME TO DECEMBER
15, 1920, FOR FILING RECORD.

OSAKA SHOSEN KAISHA, a corporation, Claim-
ant of the Japanese Steamship "Saigon Maru,"
her tackle, apparel, etc., and

UNITED STATES FIDELITY & GUARANTY
COMPANY, a corporation, Appellants,

v.

PACIFIC EXPORT LUMBER COMPANY, a corporation,
Libelant and Appellee.

Good cause being shown, it is by the undersigned, the judge who signed the citation on appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit,

ORDERED that the time of appellants herein for filing the record and docketing the cause on said appeal in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended and enlarged until and including the 15th day of December, A. D. 1920.

Dated at Portland, Oregon, this 15th day of November, 1920.

CHAS. E. WOLVERTON,
United States District Judge.

We consent to the entry of the foregoing order.

WOOD, MONTAGUE & MATTHIESSEN,
Proctors for Appellee.

Filed Nov. 15, 1920, G. H. Marsh, Clerk, by E. M. Morton, Deputy Clerk.

On the 19th day of November, 1920, an order was made by the Honorable Wm. B. Gilbert, Judge of the United States Circuit Court of Appeals, of the same effect as the foregoing order.

EXHIBITS

LIBELANT'S EXHIBIT "G".

Pacific Export Lumber Co.

Portland, Oregon

LUMBER

General

This charter party, made and concluded upon in the City of Portland, Oregon, this nineteenth day of March, 1917, between Osaka Shosen Kabushiki Kaisha, Owners of the Japanese steamer "Saigon Maru" of the burthen of 3311 tons or thereabouts, net register measurement, now at Singapore bound thence via ports to Tacoma, Washington, wherefrom vessel shall proceed direct in ballast to Astoria, Oregon (in which case Charterers have privilege of loading vessel only on Columbia or Willamette Rivers), for orders to be given upon arrival, and notification of same to Charterers or their agents has been given (Sundays and legal holidays excepted) or lay days to count; and thence promptly proceed to loading port to load under this Charter, of the first part, and Pacific Export Lumber Co. of Portland, Ore., of the second part.

Witnesseth, that said party of the first part agrees on the freighting and chartering of the whole of said vessel, including the deck (with the exception of the cabin and necessary room for the crew, and the stowage of provisions, bunker coals, sails and cables) or sufficient room for the cargo hereinafter

(Libellant's Exhibit G.)

mentioned, (the Act of God, Perils of the Sea, Fire, Barratry of Master and Crew, Enemies, Pirates, Piratical Thieves, Arrest and Restraint of Princes, Rulers and/or Peoples, Collisions, Stranding and other accidents of navigation excepted, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the ship-owners; the ship has liberty to call at any ports in any order, to sail without Pilots, and to tow and assist vessels in distress, and to deviate for the purpose of saving life or property; ship not answerable for losses through explosion, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull, not resulting from want of due diligence by the owners of the ship, or any of them, or by the ship's Husband or Manager; Civil Commotions, Floods, Frosts, Freshets, Fire, Strikes, Lockouts, Accidents on Railways and/or Docks and/or Wharves, or at Mills, or any other hindrances beyond the control of either party to this agreement or their agents, always mutually excepted) unto said party of the second part, for a voyage from a usual safe loading place on the Columbia or Willamette Rivers as ordered by Charterers or their agents to Bombay, India, at Charterers' option, to discharge, as shall be ordered by them on the Captain's signing Bills of Lading at place of loading, on the terms following:

A. The said vessel shall be tight, staunch, strong, seaworthy, and in every way fitted and pro-

(Libelant's Exhibit G.)

vided for such a voyage, and shall receive on board for the aforesaid voyage the merchandise hereinafter mentioned, and no goods or merchandise shall be laden on board otherwise than from said party of the second part, or their agents.

B. The said party of the second part doth engage to furnish to said vessel, at designated loading place or places as herein provided, a full cargo of Sawn Lumber and/or Timber of such lengths and sizes as can be taken through vessel's present hatchways and/or bow and/or stern ports, if any, and on deck.

D. Small Stowage, Charterers agree to furnish and steamer agrees to accept ten per cent (10%) of cargo, say Laths and/or Pickets and/or short lumber, as they may prefer, the latter not to be under twelve (12), except at Charters' option, nor over fifteen (15) feet in length, freight on which is to be at one-half rates;—one thousand Pickets or six thousand laths to be considered equivalent to one thousand feet board measure.

E. Laths and/or Pickets if received by vessel in bundles to be delivered in bundles containing like quantities, and no cargo to be cut by vessel without written authority from Charterers or their agents.

G. The said party of the second part agrees to pay to said party of the first part, or agent, for the use of said vessel during the voyage aforesaid, Two hundred and forty shillings Sterling (240/—) per thousand feet board measure payable in cash on

(Libelant's Exhibit G.)

signing Bills of Lading, at the current rate of exchange for ninety (90) days' sight Bills on London.

H. The party of the second part shall be allowed for loading and discharging said vessel at the respective ports aforesaid, lay days as follows: Three hundred thousand feet per working day for loading, to commence twenty-four (24) hours after vessel is at loading place designated by Charterers or their agents, her inward cargo and/or unnecessary ballast discharged, or necessary ballast loaded and trimmed, and she is ready to receive cargo, and Captain has notified them in writing to that effect. Discharge to be given with dispatch according to the custom of the Port of discharge at such safe wharf, dock or place as Charterers or their agents shall designate, at the rate of three hundred thousand feet B. M. per working day, counting from time of steamer being in berth as ordered and ready to discharge cargo. For each and every day's detention by default of said party of the second part, or their agents, Two Thousand Dollars (\$2,000.00) U. S. Gold, or its equivalent, per day, shall be paid day by day, by said party of the second part, or their agents, to said party of the first part, or agent.

I. In case of fire, accidents or other casualty at loading place, Charterers to have the privilege of ordering the vessel to another safe loading place on the Columbia or Willamette Rivers, as above, there to load or to complete loading, they paying the cost of towage in so moving, if any; but the time occupied

(Libelant's Exhibit G.)

in such removal not to count as lay days. Charterers also to have the privilege of loading vessel at two or more mills, ship paying extra cost, if any, incurred in such removal, and time occupied in so moving to count as lay days.

J. Vessel to furnish, prior to loading, a certificate from a Marine Surveyor, approved by Charterers or their agents, that she is in proper condition for the voyage, and after loading a further certificate that she is properly loaded and ready for sea. Should vessel fail to pass satisfactory survey and should be detained more than ten days for repairs, to enable her to pass such survey, this Charter to be void at Charterers' option, such option to be declared at the end of said ten days.

K. Cargo to be stowed under the Captain's supervision and direction, and the stevedore, (if any) in all cases the servant of the vessel, employed by the vessel, to be mutually satisfactory to the Captain and Charterers, or their agents.

L. Cargo to be received and delivered within reach of vessel's tackles and according to the customs of ports of loading and discharge.

M. Clean Bills of Lading to be signed by Captain for pieces, as required by Charterers, (all on board to be delivered), and at any rate of freight Charterers may desire, without prejudice to this Charter; but if at a lower rate than provided in Charter, difference to be paid in cash to Captain at

(Libelant's Exhibit G.)

port of loading, less commissions, interest and insurance.

N. Any and all liability of the Charterers under this Charter shall cease as soon as the cargo is on board, the vessel to have a lien on cargo for all freight, dead freight and demurrage.

O. Vessel to load and discharge where she can safely lie afloat; but lighterage, if any, to enable vessel to reach port of discharge, to be at the risk of receivers of cargo, and expense of vessel.

P. General Average, if any, payable as per York-Antwerp rules of 1890.

Q. Vessel to pay a commission at port of loading of five per cent (5%) on amount of Charter, in U. S. Gold Coin, at the exchange of \$4.86 per £ sterling, to Charterers or their agent, and to be consigned to O. S. K. agent at port of discharge (inward only) paying them £5-5-0 for doing Custom-House business.

R. While at loading port, as above, vessel to be consigned to Charterers' agents, outward, and if in ballast, also inward, free of commission, but paying them usual fee for doing Custom-House business, (not to exceed \$75), and also to clear in the name of Charterers.

S. Should vessel not have arrived at port of call (as above), or at her loading port, if ordered direct there, on or before 12 o'clock, midnight, of the Fif-

(Libelant's Exhibit G.)

teenth of June, 1917, Charterers to have the option of cancelling or maintaining this Charter, on arrival of vessel.

Lay days not to commence before May tenth, 1917, unless at Charterers' option.

T. This Charter Party is subject to all the terms and provisions of, and exemptions from liability contained in, the Act of Congress of the United States entitled "An act relating to the navigation of vessels, etc.," and approved the 13th day of February, 1893.

V. To the true and faithful performance of each and all of the foregoing agreements, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators and assigns, each to the other in the penal sum of

ESTIMATED AMOUNT OF CHARTER.

In witness whereof we have hereunto signed our names at the time and place above mentioned.

PACIFIC EXPORT LUMBER CO.

By Wm. D. Wheelwright, President.

OSAKA SHOSEN KAISHA,

Edwin Orrett, Local Manager.

Witness: A. Matthews.

Witness: G. H. Wagner.

Filed Dec. 20, 1919, G. H. Marsh, Clerk.

(Libelant's Exhibit O.)

LIBELANT'S EXHIBIT O

COPY L/B 12/265
PACIFIC EXPORT LUMBER CO.
1004 Chamber of Commerce Building

Portland, Oregon, June 4, 1917.

2,532,651 ft. Rgh Merch Lumber
Invoice of 196,354 ft. Dressed "

2,729,005 ft.

Shipped per S. S. "SAIGON MARU" from Portland, Ore.

Consigned to ORDER AT BOMBAY, INDIA

For account of MESSRS. GILLANDERS, ARBUTHNOT & CO., CALCUTTA.

Marked

Our Order 1705 "ADNEXA" Your No.

UNDER DECK

32,876 pcs. Rough Lumber2,291,092 ft. BM

31,232 pcs. (7808 Bdls. Ea 4 Pcs) Dressed Lumber (PIST&G) 196,354 ft. BM

64,108 " As per specifications.....2,487,446 ft. BM

(Libellant's Exhibit O.)

—4145.743 lds. of 50 cu. ft. @ 180/— per load,
basis "G" list c.i.f. Bombay

£37,311.13.10

906. 5. 9

Extras:—\$4,242.56 @ \$4.681/8.....

Extras per "G" List:

3x 5	10/14	3,180			
3x 9	10/14	16,650	19,830 ft. @ 50	\$	9.91
1x12	10/15	11,535			
2x12	16/32	38,932			
2½x12	10/14	18,075			
3x 6	16/32	119,022			
3x12	16/32	48,420			
4x 4	16/32	165,413			
6x 6	16/32	52,524			
8x 8	16/40	49,515			
10x10	18/48	136,909			

(Libelant's Exhibit O.)

12x12	23/34	452,808	1,400,557 ft @ 1.00	1,400.56
12x12	35/40	307,404		
		<hr/>		
3x 5	16/32	37,765		
3x 9	16/40	151,168		
5x 5	16/32	49,606	238,539 " @ 1.50	357.81
		<hr/>		
1x12	16/32	31,510		
1½x12	10/15	20,936		
2½x12	16/32	47,510	99,956 " @ 2.00	199.91
		<hr/>		
6x12	16/34	156,162		
9x 9	16/40	149,829	305,991 " @ 2.50	764.98
		<hr/>		
1½x12	16/32	29,422	29,422 " @ 3.00	88.27
12x12	41/52		153,720 " @ 4.00	614.88

(Libelant's Exhibit O.)

1 x 6	10/15 P1ST&G	175,530 ft. @ 4.00	702.12
1 x 6	"	20,824 " @ 5.00	104.12
			<hr/>
			\$4,242.56
			Forward, £38,217.19.7

Pacific Export Lumber Co., Page #2 L/B 12/266 Invoice Date 6-4-17 Sheet No. 2
 Forward, £38,217.19.7

ON DECK

2171 Pcs. Rough Merch. Lumber as per specifications 241,559 ft. BM
 —402,598 loads of 50 cu. ft. @ 180/— per load, basis

		"G" list c.i.f. Bombay	3,623. 7.8
Extras per "G" List:		\$609.60 @ 4.681/8	130. 4.5
3x 5	10/14	1,057	
3x 9	"	3,523	
		4,580 ft. @ .50	2.29

1x12	12/14	662
2x12	16/32	4,228

(Libellant's Exhibit O.)

3x 6	16/32	2,103			
3x12	"	7,674			
4x 4	"	6,520			
6x 6	"	6,012			
8x 8	"	18,021			
10x10	20/46	12,658			
12x12	24/34	33,468			
12x12	35/40	34,764	126,110 ft. @ 1.00	126.11
3x 5	16/32	797			
3x 9	"	1,980			
5x 5	"	1,321	4,098 ft. @ 1.50	6.15
		—			
1x12	16/32	2,996			
1½x12	14	42			
2½x12	16/32	170	3,208 ft. @ 2.00	6.42
		—			
6x12	"	40,572			
9x 9	16/36	1,545	42,117 ft. @ 2.50	105.29

(Libellant's Exhibit O.)

1½x12	16/32	771	771 ft.	@ 3.00	2.31
12x12	41/50	24,180	24,180 ft.	@ 4.00	96.72
12x12	51/60		22,680 ft.	@ 7.00	158.76
12x12	61/70		7,968 ft.	@ 10.00	79.68
12x12	72/82		1,848 ft.	@ 14.00	25.87
					<hr/>
					\$609.60
					£41,971.11.8

Freight prepaid

Insured with Indemnity Mutual Marine Ass'n Co., Ltd., of London, for:

Under Deck	\$206,000
On Deck	20,250

E. & O. E.

Portland, Ore., June 4, 1917

PACIFIC EXPORT LUMBER CO.,

By (Sgnd.) A. Matthew,

Secy.

Filed December 20, 1919

G. H. MARSH, Clerk.

LIBELANT'S EXHIBIT P

1233

INMAN-POULSEN LUMBER CO.

Portland, Oregon, June 4, 1917.

Sold to Pacific Export Lumber Co. Order No. 1705

Ex. "Saigon Maru" Loaded in....

Bombay, India

Lin.	B.M.	Lin.	B.M.
------	------	------	------

UNDER DECK

Rough Merchantable

1x12	10 to 15	11535			
2x12	16 to 32	38932			
2½x12	10 to 15	18075			
3x 6	16 to 32	119022			
3x12		48420			
4x 4		165413			
6x 6		52524			
8x 8		49515			
10x10	20 to 40	136909			
12x12	25 to 34	452808			
12x12	35 to 40	307404	1400557	12 50	17506 96
1x12	16 to 32	31510			
1½x12	10 to 15	20936			
2½x12	16 to 32	47510	99956	13 50	1349 40
1½x12			29422	14 50	426 62
2x12	10 to 15	17088			
3x 6		25989	43077	11 50	495 38
3x 5		3180			
3x 9		16650	19830	12 00	237 96
3x 5	16 to 32	37765			

(Libelant's Exhibit P.)

	Lin.	B.M.		Lin.	B.M.
3x 9		151168			
5x 5		49606	238539	13 00	3101 00
6x12		156162			
9x 9		149829	305991	14 00	4283 87
12x12	41 to 50		153720	15 50	2382 66
Common Flg.					
1x 6	10 to 15		175530	14 00	2457 42
1x 6	16 to 24		20824	15 00	312 36
ON DECK					
Rough Merchantable					
1x12	16 to 32	2996			
1½x12	10 to 15	42			
2½x12	16 to 32	170	3208	13 50	43 31
1x12	10 to 15	662			
2x12	16 to 32	4228			
3x 6		2103			
3x12		7674			
4x 4		6520			
6x 6		6012			
8x 8		18021			
10x10	20 to 40	12658			
12x12	24 to 34	33468			
12x12	35 to 40	34764	126110	12 50	1576 37
1½x12	16 to 32		771	14 50	11 18
2x12	10 to 15	204			
3x 6		3795	3999	11 50	45 99
3x 5		1057			
3x 9		3523	4580	12 00	54 96
3x 5	16 to 32	797			

(Libelant's Exhibit P.)

	Lin.	B.M.		Lin.	B.M.
3x 9		1980	2777	13 00	36 10
6x12		40572			
9x 9		1545	42117	14 00	589 64
12x12	41 to 50		24180	15 50	374 79
12x12	51 to 60		32496	18 50	601 18
5x 5	16 to 32		1321	13 00	17 17
			<hr/>		
			2729005		\$35904 32

Filed December 20, 1919,

G. H. Marsh, Clerk.

LIBELANT'S EXHIBIT P, Page 2

\$35,904.32
Less 2½%..... 897.61

\$35,006.71
Less 2½%..... 875.17

\$34,131.54

An
Ent J196

LIBELANT'S EXHIBIT "Q"

May 18, 1917.

Refer to File No. 525-1.

Pacific Export Lumber Company,
1004 Chamber of Commerce Bldg.,
Portland, Oregon.

Dear Sirs:

S. S. SAIGON MARU VOYAGE 1.

We advised our principals by letter that we expected that the S. S. Saigon Maru would coal at Muroran, and unless otherwise instructed would arrange for her to call at that port, as by so doing we would be able to take on less coal here, and more cargo.

Under date of May 17th, we received a cable from Osaka, referring to our letter, and instructing us to coal at Nagasaki, which, of course, we shall comply with.

Yours truly,

O:HN

Cy: Saigon Maru

Capt. Yano

Cy: S. M.

Filed Dec. 20, 1919, G. H. Marsh, Clerk.

LIBELANT'S EXHIBIT "U".

March 21, 1917.

Messrs. Gillanders, Arbuthnot & Co.,
Calcutta, India.

Dear Sirs:

We wrote last on the 19th, and have now the pleasure of confirming our cable of yesterday as per list herein, which closes the sale to your good-selves of a full and complete cargo of Oregon Pine lumber of merchantable quality, for shipment in April-May, subject to possible detention, by the SS "Saigon Maru" due to arrive here on the 20th of May next, at a minimum loading rate of 300,000 ft. per working day. It is expected, however, that she will load much faster than that, as stated in our letter of the 19th, but perhaps we were somewhat optimistic in saying five or six days—seven would have been safer. The steamer is on the regular line of the Osaka Shosen Kaisha, and proceeds from Singapore via Hong Kong and Japanese ports to Tacoma, where she is represented by them as being due on the 11th of May, so that we have no reason to expect detention except by some unforeseen circumstances. The quantity is understood to be 3,300,000

(Libelant's Exhibit U.)

ft., the usual 10% more or less, and the cargo is to be furnished in accordance with the enclosed schedule called "Adnexa", which you will observe calls for 3,300,000 ft., including stowage, and any variation from this schedule will be in proportions of the various items, as nearly as possible, but of course not exactly. You are to receive the lumber at the rate of at least 300,000 ft. per working day at Bombay, and that condition will appear in the Charter Party. The price is one hundred and eighty shillings sterling (180/—) per load of 50 cubic feet (say 300/—per M ft. B. M.) on the basis of "G" List, c. i. f. Bombay including war risk, payable by our ninety days' sight draft on London under a Bank credit to be opened by your good selves in due course, the draft to be for full invoice value, including freight, and the usual shipping documents, viz: invoice, Bills of Lading, and insurance and War Risk policies to be attached to same. (This condition as to Bank Credit is in accordance with our cable of Mar. 3rd and your reply received here on the 9th idem, referring to that cable).

We thought it proper to put before you by wire the information contained in our letter of the 19th with regard to the "Thordis" which is unlikely to make the voyage, although perhaps she may do so. Also to ask you to inform Messrs. Henderson & Co. of this transaction if there is no objection to doing so, and to suggest that they make firm offer by wire.

(Libelant's Exhibit U.)

In spite of our knowledge of the intimate relations between yourselves and these friends we don't feel at liberty to mention the matter ourselves.

Yours faithfully,

PACIFIC EXPORT LUMBER CO.

(Sgd.) By Wm. D. Wheelwright, President.

Enclosures:

Cable List

Schedule "Adnexa"

L/B 12/379—Copy of Cable to Gillanders, Arbuthnot & Co. Sent Mar. 20—1917 2:00 P. M.

We confirm the sale chartered "Saigon Maru." Shall we repeat. If we can others including Japanese inquiring actively Inform Henderson If there is no objection suggest they make firm offer by telegraph—For your private information only steamer as per our telegram of 31st day of January. Sold for March. Shipment Cannot proceed in consequence of Detained by the authorities—Prospects are very doubt ful.

Memo of correspondence between Pacific Export Lumber Company and Gillanders, Arbuthnot & Co. re claim on "Saigon Maru":

(Libelant's Exhibit U.)

L/B 13/390 P. E. L. Co.'s Cable to Gillanders, Arbuthnot & Co.

ABC 5th Portland, Oregon, June 4, 1917, 5 P. M.

GILLANDERS

CALCUTTA

SAIGON CLEARING RIVELLOLA REPAUSEM
SOLVENTAR SONANCE CAN CAMAROSE
RIPOTREI MORE CAPTAIN REFUSES CACH-
OEIRA COMPEL PERNONIDA

WHEELWRIGHT

Translation :

Saigon clearing 4400 loads 50 loads survey has
been held surveyors report can carry on deck 770
loads more captain refuses we cannot compel we
protest against

Reply by Cable, Calcutta June 7/17:

Referring to your telegram of 5th: If steamer
sails without loading full quantity, telegraph spec-
ification shipped. Particulars urgently wanted. We
think question shortage better remain over time
being.

Their reply: Extract from letter dated Calcutta
22nd June.

"Saigon Maru". Your telegram of the 5th June
advising us that you expected only to be able to load
4450 tons on this steamer came as a great shock to

(Libelant's Exhibit U.)

us, your previous telegrams and letters having given us clearly to understand that you expected to ship not only 5500 tons but more than this quantity, you having asked us to increase our Letter of Credit from £50,000/— to £55,000/— a part of which money we understood would cover the cost of some quantity in addition to the 5500 tons.

We sympathize with you very sincerely in the difficulties which we understand you have had to face from the Captain. We received your telegram of the 9th instant giving us full particulars of the specification and advising that 4540 Tons had been shipped. You do not mention sailing date but we conclude the steamer sailed the same day.

It is quite clear that your sale to us was for a quantity of 5500 tons at £9/— per ton of 50 C ft. the sale allowing you to ship 10% more or less. 10 less gives a minimum quantity of 4950 tons so that in only shipping 4540 tons there is still a balance due to us of 410 tons. What however to us is even more serious than this is that you have practically shipped in full the inferior sizes and have shipped very short the superior sizes. The most superior size is of course the 12x12 Squares 35 ft. & up of which quantity we ordered 1500 tons and you have only shipped 920 tons. The size we next most wanted was 12"x12"x24/34' of which we ordered 1000 tons and you have only shipped 810 tons. These 2 sizes are very particularly wanted in India and as we feel sure you must have been aware that we

(Libelant's Exhibit U.)

should want these sizes above any of the others it is a great disappointment to us that your shipment is particularly short in these valuable Squares.

Disregarding in the meantime the profit that we should have been able to make on the minimum shortage of 410 tons, the market with you since we purchased the cargo has advanced at least £2/10 per ton so on this account alone we have lost a sum of £1,020/—. In our telegram of 6th June we telegraphed to you that we thought the question of shortage had better remain over until we knew what you had actually been able to ship. The loss to us in your not having been able to ship the minimum quantity of 4950 Tons is not by any means, as we are quite sure you are aware, confined to a sum of £1020/— but is very considerably more than this as supplies of Pine are very short in India. Pine squares particularly are selling at very high prices. We have decided not at any rate in the first place to put forward any distinct claim, feeling quite sure that you will see your way to meet us as far as possible in this matter and we now look forward to hearing from you.

Extract from P. E. L. Co.'s letter to G. A. & Co., of
June 6th.

“Saigon Maru”. This steamer finished loading on Sunday, the 3rd inst., and proceeded to sea at 4:00 A. M. yesterday morning, on a direct voyage to Bom-

(Libelant's Exhibit U.)

bay, except for coaling at Nagasaki. We cabled you on the 4th, as per list herein, in confirmation of which we beg to advise that the Master of the steamer was averse to taking a full deckload from the beginning, but that the Agent of the Osaka Shosen Kaisha, Mr. Edwin Orrett, notified him that he should take 750 M ft. or such quantity as should be determined by the Marine Surveyors. We impressed this upon the Captain and notified him more than once that he must take a full deckload, and that his failure to do so would involve heavy damages, for which we should hold the steamer and her owners responsible. For details we refer you to enclosed copies of our letters to the Master as follows: May 26th (2), May 31st, June 1st, 2nd and 4th. The Marine Surveyor, representing the San Francisco Board of Underwriters, informed the Master that in his opinion the ship should carry a deckload of 700 M to 800 M ft., beside which we called a special survey, the result of which was that the surveyors reported in favor of a deckload of about 700 M ft., subject to further examination and report after a portion had been loaded, as per their Report herein dated May 31st. Later on, after the Master had stopped the loading, they made a final report dated June 4th, which we also enclose, to effect that the steamer could have taken on the quantity mentioned in their earlier certificate, that is to say, 700 M ft. Our best efforts and those of the Marine Surveyor, as well as of the Owners' Agent who was here,

(Libelant's Exhibit U.)

failed to have the slightest effect on the Captain, so, as we couldn't compel him to take a full and reasonable deckload, we libeled the steamer in a suit for such damage as we had suffered, or might prove to suffer, and exacted a sufficient bond. The shortage of 460 M. ft. to 560 M. ft. (according to whether she could have carried 700 M. ft. or 800 M. ft. On Deck) is the result of this mis-conduct of the Captain, which is also the cause of a short-shipment in the long lengths, which could only go On Deck, and although of course you pay a correspondingly lower price, we feel it is quite possible that you may suffer some damage by reason of not receiving the longer lengths that you had a right to expect. And you will observe that we expressly notified the Master that the ship would be liable for such loss or damage as the buyers might prove to have suffered. So we conclude that it will be quite in order for you to proceed against the ship in Bombay for the purpose of collecting such damage as may have been incurred by the wrongful act of the Master. Such a course may perhaps not be open to you, in which case we will thank you to cable us as soon after receipt of this letter as possible, the approximate amount of your loss by reason of the short-shipment, not only in quantity, but in the larger dimensions, in order that we may include it in our suit against the ship. And of course it will be necessary for you to substantiate this claim by the proper proofs in due course," etc.

(Libelant's Exhibit U.)

Letter from G. A. & Co., Calcutta, Dated 4th August, 1917. (Excerpt.)

"We are in receipt of your letters dated 26th May and 2nd and 6th June enclosing documents as detailed by you covering shipment of Oregon pine per SS Saigon Maru for which we thank you.

"*'Saigon Maru.'* We note that the short shipment of about 410 tons by this steamer was due to the captain refusing to take a full and reasonable deck cargo. We wrote to you on 22nd June giving you particulars of our loss on account of difference in price, on the 410 tons short shipped, owing to the market having advanced since we purchased from you. Our claim does not include any loss on account of a large portion of the longer lengths having been short shipped. We thought it fairest to base our claim on the market value c.i.f. at your end at the time the steamer sailed, but in doing this we did not in our opinion base the advance in price at a high enough figure, as we feel sure the advance in price c.i.f. on the long squares shut out must have been considerably more than £2:10:— per ton c.i.f. seeing that this was the advance on the base price. However, it is not our wish to increase our claim and we propose therefore to let it stand as it is.

"We note that you will think it will be quite in order for us to take proceedings against the ship

(Libelant's Exhibit U.)

in Bombay for the amount of our claim but as our purchase from you was c.i.f. Bombay there is we think no question that this is a matter for you to settle with the steamer and we confirm our telegram of yesterday to you as follows:

"Referring your letter dated 6th June we have submitted our claim £1020/— as per our letter of 22nd June. Our claim is against you, we have nothing to do with the steamer."

"We trust you will succeed in obtaining fair treatment from the owners as the captain seems to have behaved in an extraordinary manner in refusing to load in accordance with the recommendations of the marine surveyor and in terms of the charter party. Our Bombay friends advise us that the vessel arrived at Bombay yesterday afternoon."

May 26, 1917.

Captain Y. Yamamoto,

SS "Saigon Maru",

Portland, Ore.

Dear Sirs:

As charterers of your steamer, by virtue of a Charter Party dated Mar. 19th for a voyage from this port to Bombay, we hereby notify you to proceed to the dock of the Inman-Poulsen Lumber Co. in Portland Harbor and there take on a full cargo of sawn lumber and/or timber, both Under and ON Deck as provided in said charter. Sufficient stowage will be provided to enable your steamer to carry a full

(Libelant's Exhibit U.)

load. As regards deckload, we have to say that we are in possession of a communication from your owners reading as follows: "The ship is to loaded at Portland with a full cargo of lumber for Bombay. Deckload to be handled as much as safety of steamer permits." We shall therefore expect you to take a full deckload, that is to say, as large a quantity as is consistent with the safety of your ship. It is specially important that the steamer should carry a good and sufficient deckload as a considerable portion of the cargo consists of lengths that can't go Under Deck, and which therefore must be shipped On Deck.

A large portion of the cargo is ready, but the balance will have to be sawed, and in order that we may suit the quantity to what the steamer is going to carry we will thank you to inform us, after consulting the marine surveyor, of approximate quantity of proposed deckload.

Yours faithfully,

Pacific Export Lumber Co.

By.....President.

June 1, 1917.

Captain Y. Yamamoto,
SS "Saigon Maru"
City.

Dear Sir:

Referring to our letter of yesterday, we ask you to take due note of a telegram received by us this

(Libelant's Exhibit U.)

morning from the Agent of your Company, Mr. Edwin Orrett, dated San Francisco May 31st, reading as follows:

"Advise Captain will expect him to load up to the capacity as indicated by Marine Surveyor and approximately seven hundred and fifty thousand feet On Deck."

Understanding that Captain Yano has stated that your owners did not expect you to take any deckload, we have to say that your owners wrote Mr. Orrett, their Agent at Tacoma, under date of Mar. 14th advising that "the ship is to be loaded at Portland with a full cargo of lumber for Bombay. Deckloads to be handled as much as safety of steamer permits."

Herein we hand you for perusal the original letter of Mr. Orrett containing the above statement, and we again notify you that your ship will not be cleared from this port until she has loaded an entire cargo of lumber and/or timber as provided in the Charter Party. Any delay, damage, demurrage or expense incurred by your failure to do so will be for account of the ship.

Yours faithfully,

Pacific Export Lumber Co.,

By.....President.

Enclosure:

Mr. Orrett's letter

(Libelant's Exhibit U.)

June 2, 1917.

Captain Y. Yamamoto,
Master of "Saigon Maru"
Portland, Ore.

Dear Sir:

We are informed that you caused the Stanchions that have been supplied for your deckload to be cut down to lengths of 7 ft. (thus reducing them from 14 ft., which length is necessary to enable you to carry the deckload approved by the Marine Surveyors.)

And we hereby notify you again that we shall not clear the ship until she has loaded a full cargo of lumber in accordance with the Charter Party, or until you shall have paid such damages as we suffer or are likely to suffer from your refusal to load in accordance with your Charter Party.

We also confirm our statement to you that if you carry 500 M ft. less On Deck than the steamer is capable of taking, you are causing a loss to your owners of some \$27,000.00 in the way of freight; you will also be causing us a serious loss in the way of our not being able to ship lumber that we contracted to forward by your steamer, and that you will cause great damage and loss to the buyers of the cargo at Bombay, which we have no doubt they will proceed to collect of the ship at that port.

We therefore notify you that unless you proceed to load the balance of your deckload in accordance

(Libelant's Exhibit U.)

with the report of the Marine surveyors, and continue to load same until you have a full cargo of lumber both Under and On Deck, we shall proceed immediately to libel your ship and collect our damages.

Yours faithfully,

Pacific Export Lumber Co.,

By.....President.

June 4, 1917.

Captain Y. Yamamoto,
SS "Saigon Maru"
Portland, Oregon.

Dear Sir:

Referring to our letters of May 26th, May 31st, June 1st and June 2nd notifying you of our insistence upon our right to ship by your steamer a full cargo of lumber, both Under and On Deck, as provided in the Charter Party dated March 19th, 1917, and of our intention to claim of your steamer such damage as we might suffer as the result of your not taking a full deckload, also notifying you that your failure to do so would perhaps cause great damage and loss to the buyers of the cargo at Bombay which we have no doubt they will proceed to collect of the ship at that port, and referring to the fact that you have loaded On Deck 238,283 ft. and have refused to load more, instead of 700 M ft. the quantity

(Libelant's Exhibit U.)

which, in the opinion of the Marine Surveyors, she could carry on deck as a minimum, we hereby enter our protest against your leaving this port with only part of a deckload.

Yours faithfully,

Pacific Export Lumber Co.,

By.....President.

FINAL REPORT OF SURVEY

SS "Saigon Maru"—Gross Tons 4354

This is to certify that we, the undersigned, held survey during the final loading of this vessel, and find as follows:

Vessel stopped taking on deck cargo June 3rd 1917 with four feet abaft and six feet forward, of lumber on deck.

During final loading vessel at no time showed any sign of tenderness. It is our opinion that this vessel could have taken on deck the amount specified in survey report dated May 31st 1917.

Dated June 4—1917

ANDREW HOBEN,
Marine Surveyor

E. C. GENEREAUX
Marine Surveyor

(Libelant's Exhibit U.)

L/B 13/454 P. E. L. Co's Cable to G. A. & Co.,
June 8th, 1917.

Bentley's. June 8, 1917 4 P. M.

ROBYRLESYS VEPZOATOLV LETPELEMUL
SARIKURHIZ LERLALESUR URFATGIDUB
LEOVSVEPZO LEMULIFFME IFHYLUPYAS
IFGYKUPREN IFGUJUPOBZ IFGOHUPLOK
IFGIGIFGAD UPHVAIFGIG UPJIGIFJUL
IFJULUPVIS IFGYKUPVIS IFJIJSARIK
UPSHAIFHYL IFHYLUPSEP IFGYKUPTOS
IFHOJSARIK UPOZYIFHEG SARIKUPWES
IFHOJIFGYK UPKIGIFKAH SARIKUPVIS
PLANED UPYASTULEN UPTOSUSEWJ
UROKDUPGRO.

WHEELWRIGHT.

Translation:

Shipped 35 up average 40, 12 square 920 tons
24 34 810 tons Following 16 up 12 inches 6" 330
tons, 3" 93 tons, 2½" 80 tons, 2" 72 tons, 1 & ½"
50 tons, 1" 58 tons, 9" 9" 3" 200 tons, 5" square 85
tons, 4" square, 290 tons 5" 3" 64 tons, 10" square
250 tons. Planed 330 tons Stowage 200 tons Total
4500 tons 40 tons.

(CAH)

L/B 13/478 P. E. L. Co.'s Letter to G. A. & Co.,
June 9th, 1917.

"'Saigon' Shortage. We can probably ship this
by the 'Volund' if we secure her, otherwise we don't

(Libelant's Exhibit U.)

know of any means to get the lumber forward to Bombay, and think the proper procedure is to collect the damages of the steamer either at Bombay or through us here as intimated in our last letter."

L/B 14/2 P. E. L. Co.'s Letter to G. A. & Co.,
June 14th, 1917.

"Our last respects were dated 9th inst., and we learn today that the SS 'Volund' was chartered for one round voyage to Japan-China-Manila and back to this coast. The rates obtainable for such business as this make it certain, we think, that no reasonable offer for Indian business would have been accepted.

"Our advices from San Francisco today are to the effect that no one there seems to be interested in business for Calcutta or Bombay, showing a very recent change in the situation as we heard only two or three days ago that people there were asking for offers of the 'Volund' to those ports although at a rate much lower than the one that we figured on as probable."

L/B 14/435 P. E. L. Co.'s Letter to G. A. & Co.,
August 14th, 1917. (Excerpt.)

"'Saigon Maru.' At present writing we cannot say anything definite or satisfactory about this troublesome matter. The owners' agents are

(Libelant's Exhibit U.)

making an attempt in court to dismiss our libel against the ship, and pending a decision on that claim, it is useless to discuss the matter beyond saying that we are still hopeful of forcing a settlement that will cover the entire loss, yours and ours."

L/B 15/486-7 P. E. L. Co.'s Letter to G. A. & Co.,
October 23rd, 1917. (Excerpt.)

"*'Saigon Maru.'* The attempt of the owners of this steamer to have our libel dismissed was unsuccessful, whereupon their lawyers suggested to our counsel that they thought it would be a good plan to discuss a compromise. But we saw no reason why a suggestion of that kind should come from us, so we wrote the Tacoma agent of the *'Osaka Shosen Kaisha'* presenting our formal claim, in which was included the sum of £1025 on your account, asking for a settlement, and pointing out that we had saved the company much more than the total amount of the two claims by means of extra despatch in loading. We told him that, while we were naturally desirous of a prompt settlement, we would give him time to submit the matter to the home office of the company in Japan, which he said he would do. This was on the 5th inst. or thereabouts, and reply should reach here by the middle of November."

(Copy of letter to Orrett referred to above attached hereto.)

(Libelant's Exhibit U.)

Letter Book 15/321.

"Portland, Ore., Sept. 28, 1917.

Edwin Orrett, Esq., Manager,
Osaka Shosen Kaisha, Tacoma, Wash.

Dear Sir:

'Saigon Maru.'

We received a letter yesterday from our Bombay friends who purchased the cargo that went forward by the steamer above named, in which they state the amount of their claim to be as follows:

Loss on 410 tons short shipped—£2.10 per
ton, £1025.0/0, which at banker's selling
rate for exchange on London would be
about\$4868.75

Our own loss and expenses amount to..... 3898.05

Exclusive of attorney's fees (the amount of
which we do not know) _____

Making a total of.....\$8766.80

They say, however, that this does not represent their loss by any means, as the behavior of the captain resulted in their being deprived of the longer and more valuable lengths, so that their loss is considerably more than the amount named. We are inclined to think, however, that they will accept £1025.0/0 in full settlement, provided it is paid promptly. We haven't the least hesitancy in asking your company to pay the \$8766.80 in view of the amount that we were able to save them by

(Libelant's Exhibit U.)

giving the ship extra despatch at this port—the laydays in accordance with the charter party extended to the 11th June at 7 A. M., whereas the ship was finished on the 3d of that month at 5 P. M. Taking the demurrage rate of \$2000 per day as the basis, you will see that the gain to the ship was \$15,000, less extra stevedoring of \$1030, making a net saving of \$13,970.

We might also urge perhaps that the experience will be of value to your company if they are willing to look kindly and favorably on the facts and suggestions contained in our letter to you of June 5th, the letter being in effect that they employ masters who are willing to load their ships as do the masters that are employed by other owners. We may mention here that we cleared the 'Somedono Maru' from this port with a cargo for Kobe about ten days ago; that on a previous occasion she loaded 1,103 M on deck; that this time the ship carried a reduced quantity under deck, owing to the fact that the sizes did not make stowage, so that there was some question as to whether she could stand as much of a deck load as if she had been properly loaded throughout. But the captain, instead of taking advantage of that condition, ordered stanchions 18 ft. long so as to carry a larger deckload if possible than he did before. This is the kind of man we like to deal with in our own interests and that of our clients. As it was, however, owing to her having some 1600 tons of steel on board she

(Libelant's Exhibit U.)

came down to her marks with a deck load of 1,051 M; and this is by no means an isolated case; we have had other Japanese captains who have shown the same spirit.

We shall be glad to wait for you to send a bill over to Japan if you see fit, subject to reply by cable.

Yours faithfully,

PACIFIC EXPORT LUMBER CO.,

(Signed) By Wm. D. Wheelwright,
President."

L/B 17/65 P. E. L. Co.'s Letter Dated Jan. 15th,
1918, to G. A. & Co. (Excerpt.)

"'Saigon Maru.' We cannot at present writing see exactly eye to eye with you in the position that you take, but are quite sure that there will be no differences that won't be settled entirely to your satisfaction. But we hesitate to discuss the matter as frankly as we should like to do just now while our suit against that boat is pending. And we would remark with regard to this that we are dependent on the testimony that you can give us as to your loss to enable us to prosecute it. Therefore we hope our attorneys will soon receive an answer to the letter that they wrote you asking for the names of witnesses to whom interrogatories

(Libelant's Exhibit U.)

should be addressed. Your giving them the information and the testimony will, of course, be without prejudice to the position you have taken in your letters to us."

Filed Dec. 20, 1919, G. H. Marsh, Clerk.

LIBELANT'S EXHIBIT V.

Translation of Cablegram from Osaka Shosen Kaisha, Tacoma, U. S. A.

To—Osaka Shosen Kaisha, Osaka, Japan.

Address used—"Shosen, Osaka."

Date sent—June 2, 1917, from Portland, Ore. Time

A. B. C. 5th Ed.

Cypher	Translation
SAIGON	S. S. Saigon Maru
SOLVENTAR	Survey has been held
SONANCE	Surveyors report
ENTETIONS	750000 ft.
DEBARBER	May go on deck
WITH	With
SAFETY	Safety
CAPTAIN	Captain
REFUSES	Refuses
MAROTAGER	More than

(Libelant's Exhibit V.)

ENTAPICAR	300000 ft.
LINGUICA	Your loss will be about
OUTWATCH .	\$25,000
FREIGHT	Freight
CHARTERERS	Charterers
DAEDALIS	Damages are estimated
OUTRORA	To be about
BESIDE	5000
BOMBAY	Bombay
CLAIMS	Claims
CHARTERERS	Charterers
CASTLETS	Will not clear
UNLESS	Unless
CALEFRIOS	A full and complete cargo of
ABRIVENT	According to
CHARTER	Charter
PARTY	Party
LOADING	Loading
STOPPED	Stopped
IMPRINTED	Telegraph instructions direct to
CAPTAIN	Captain
LOAD	Load
DECKLOAD	Deckload
ACCORDING	According
SONANCE	Surveyors report
TALCOSITE.	Telegraph me here.
ORRETT.	Edwin Orrett, (Local Manager)

Filed Dec. 20, 1919, G. H. Marsh, Clerk.

LIBELANT'S EXHIBIT W.

"June 1, 1917.

Captain Y. Yamamoto,
Master of 'Saigon Maru,'
Portland, Oregon.

Dear Sir:

Referring to our letter of yesterday, we ask you to take due note of a telegram received by us this morning from the agent of your company, Mr. Edwin Orrett, dated San Francisco, May 31st, reading as follows:

'Advise Captain will expect him to load up to the capacity as indicated by marine surveyor and approximately seven hundred and fifty thousand feet on deck.'

Understanding that Captain Yano has stated that your owners did not expect you to take any deck load, we have to say that your owners wrote Mr. Orrett, their agent at Tacoma, under date of Mar. 14th, advising that 'The ship is to be loaded at Portland with a full cargo of lumber for Bombay. Deck loads to be handled as much as safety of steamer permits.'

Herein we hand you for perusal the original letter of Mr. Orrett containing the above statement, and we again notify you that your ship will not be cleared from this port until she has loaded

(Libelant's Exhibit W.)

an entire cargo of lumber and/or timber as provided in the charter party. Any delay, damage demurrage or expense incurred by your failure to do so will be for account of the ship.

Yours faithfully,

Enclosure:

Mr. Orrett's letter."

Filed Dec. 20, 1919, G. H. Marsh, Clerk.

CLAIMANT'S EXHIBIT G

	Net	Cu.	Cargo	Percent-
	Tons	Cap.	Underdeck	of
Sandhurst	2768	275524	24632283	.745
Ilford	2789	266860	2759339	.862
Albenga	2769	314107	2606144	.691
Cumeric	2594	282495	2469583	.729
Volga	2851	322244	2940456	.764
Saigon Maru....	2740	294874	2436851	.689

Filed December 20, 1919, G. H. Marsh, Clerk.

(Claimant's Exhibit M.)

CLAIMANT'S EXHIBIT M.

Book Page		Under Deck	On Deck	Percentage
2	10	Norman Isles	533107	24%
2	76	Cathness	469585	21%
		(Burned some lumber)		
2	134	Palatina	578380	21%
		(3510 fr. stock delivery)		
2	150	Adata	566273	25%
2	166	Guernsey	870000	32%
2	188	Oceano	373935 Piling	
		(15 piles lost)	332222 Lbr.	22%
			<hr/>	
			706157	
3	8	Thyra	712275	24%
3	56	Salfordia	555258	22%
3	96	Ventnor	589255	24%

v. Pacific Export Lumber Company 1019

(Claimant's Exhibit M.)

Book Page		Under Deck	On Deck	Percentage
3	136	Adato	1977432	23%
		(35 pieces of piling and some lumber lost)		
4	50	Queen Mary	2136339	28%
4	182	Norman Isle	2145817	30%
5	8	Oakley	2325073	32%
5	46	Tottenham	2856015	29%
5	66	Eva	2146689	20%
5	76	Sandhurst	2463283	18%
5	86	Ilford	2716972	22%
5	96	Cumeric	2469583	30%
5	112	Volga	2940456	21%
5	124	Ilford	2577971	18%
5	138	Tottenham	2793323	29%
5	154	Sutherland	2229466	24%
5	166	Oceano	3027016	26%
5	184	Albengo	2606141	21%

(Claimant's Exhibit M.)

Book Page		Under Deck	On Deck	Percentage
6	6	Sutherland	2258390	25%
6	20	Norman Isles	2189154	20%
6	34	Wymeric	3020381	23%
6	48	Jethon	2841446	26%
6	62	Apollo	2457882	22%
6	76	Christian Michelsen	1706572	29%
		(Estimated 600 M.)		
6	90	Crusader	2730954	22%
6	118	Skogstad	2428124	37%
6	132	Irish Monarch	2670127	27%
6	146	Tottenham	2795787	30%
6	160	African Monarch	2426531	31%
6	174	Kalebea	3007616	17%
6	188	Thyra	2482689	25%
7	6	Queen Alexandria	2594848	26%
7	52	Strathtay	2466762	43%
7	84	Strathgyle	2660809	42%

(Claimant's Exhibit M.)

Book Page	Under Deck	On Deck	Percentage
7 110	Bucrania	2119488	28%
7 120	Croydon	2874080	26%
7 124	Suveric (shelter deck)	290577	10%
7 142	Stephanotis	634326	30%
8 32	Strathdene	1011343	40%
8 52	Oraighall	766261	29%
8 93	Lord Seftdon	641621	24%
8 133	Queen Maud	422278	13%
	(Lost some; down to marks; creosoted sleepers, very heavy)		
9 25	Lord Sefton	2827538	26%
9 47	Shintsu Maru	110048	5%
	(Down to marks; poor carrier)		

(Pencil notation) :

8 under 23% = 28 under 25% = 20 bet. 23 and 25

9 = 30% or over 21 over 25 = 12 bet. 25 and 30.

Filed December 20, 1919, G. H. Marsh, Clerk.

CLAIMANT'S EXHIBIT "N."

"Cable Add:—'ERICHARD.'

Ericson & Richards,

Ship and Marine Surveyors,

and

15, Bank Street, Fort.

Compass Adjusters.

Bombay 29th August, 1917.

A. Erickson, A.I.N.A., F.R.S.A.

J. C. Richards, A.I.N.A.

SURVEY REPORT.

At the request of Mr. Uchiyama, agent, Messrs. Osaka Shosen Kaisha, Bombay, and of Captain Yamamoto of the Japanese S. S. 'Saigon Maru,' we the undersigned ship and marine surveyors did attend on board that vessel lying in the stream on the 3rd instant at noon (she having arrived from America on the 2nd) for the purpose of surveying and reporting upon the vessel and her cargo which consisted entirely of timber in all 5391.29 tons of which 241,559 board feet were stowed on deck. The S. S. 'Saigon Maru' is a steel screw steamer of the following dimension:

Nett Register	2740.53 Tons
Gross Register	4354.01 "
Length	353.35 ft.
Depth	30.90 "
Ext. Beam	50.35 "
Double Bottom but no Longitudinal Bulkheads.	
Draft on arrival—Fore.....	20.0 ft.
Aft	22.3 "

(Claimant's Exhibit N.)

On the day on which we visited the ship besides the cargo there were 500 tons of coal in bunkers and 361 tons water in ballast tanks. The deck cargo on the fore deck was level with the bridge and forecastle head decks, but that on the after deck level with the bulwarks. This apart from any question of stability is in our opinion right and proper as the vessel's steering rods run at the sides above the bulwarks supported by the stanchions secured to the bulwarks and it is most important that the means of steering a ship should be free and clear and if the after deck cargo had been carried above the bulwarks and had at all shifted, it would most certainly have carried away the rods and their supports and possibly by so doing placed vessel in a very dangerous position.

We carefully examined the log books and found vessel had fair weather across the Pacific but bad weather in the Indian Ocean & the Arabian Sea. From enquiries we find vessel rolled in a very slow and sluggish manner which shows a small G. M. This, however, is often noticed in timber laden ships with a high deck cargo and is a sure sign of being tender when great care has to be taken and the vessel's tanks if any are kept full. We also noted that during voyage when a tank was touched vessel took a bad list—this was also the case when helm was put hard a port or vice versa when under weigh.

Evidence was handed to us that the vessel's G.

(Claimant's Exhibit N.)

M. was determined in Japan. This G. M. worked out at 1.36 ft. This shows the vessel was tender but not dangerously so at the time. On our visit a tank, No. 2, was partly pumped out to see the effect on the vessel and she took a sudden list; when the tank was filled again she recovered her equilibrium.

We are of an opinion that taking everything practical into consideration that the vessel had sufficient raised weight and that more would have considerably decreased her stability and possibly have conduced to her loss. Further that her present stability is only due to the amount of weight in her bottom, that is, water and coal, & deprived of this she would be in a very dangerous position.

We understand that the captain refused to take more deck load in America and after examining all things as aforesaid we are perfectly in agreement with him.

We did not determine the G. M. as it being monsoon season and vessel lying in the harbor too high a sea was running.

ERICSON & RICHARDS,
Ship and Marine Surveyors."

Filed Dec. 20, 1919, G. H. Marsh, Clerk.

CLAIMANT'S EXHIBIT O.

"ADNEXA."

"800,000 feet	12x12	24 to 34 feet.
1,000,000 feet	12x12	35 ft. and up; average 40 ft.
40,000 feet	1x12	
40,000 feet	1½x12	
40,000 feet	2x12	
40,000 feet	2½x12	
240,000 feet	6x12	
40,000 feet	3x 5	
80,000 feet	3x 8	
80,000 feet	3x 9	
80,000 feet	2½x 4	
80,000 feet	2½x 8	
80,000 feet	2½x 9	
40,000 feet	2½x 5	

All beginning with 1x12 16 ft and up.

160,000 feet 8x8 20 ft. and up.

160,000 feet 8x8 20 ft. and up.

Total 3,000,000 feet.

Necessary stowage in 3 inch and under 12 to 15
ft. long."

Filed Dec. 20, 1919, G. H. Marsh, Clerk.

LIBELANT'S EXHIBIT A.

Federal Telegraph Co.

"Received at Board of Trade Building, Portland,
Oregon.

13X Ki—27—Rush.

Tacoma Wn March 7—1917

Pacific Export Lumber Co.

Portland Ore.

Have you any inquiries or do you know of any
offers for lumber for Bombay. Subject to proper
inducements we might put boat on berth May
loading

Edwin Orrett
324 P.

Filed Dec. 20, 1920. G. H. Marsh, Clerk.

*In the District Court of the United States for
the District of Oregon.*

No. 7467.

STIPULATION AS TO CERTIFYING RECORD.

PACIFIC EXPORT LUMBER COMPANY, a cor-
poration, Libelant-Appellee,

v.

THE JAPANESE STEAMER "SAIGON MARU,"
her tackle, apparel, etc., Respondent,

OSAKA SHOSEN KAISHA, a corporation of
Japan, Claimant-Appellant,

UNITED STATES FIDELITY & GUARANTY
COMPANY, Appellant.

The proctors for appellants herein having prepared and compared with the original record in this cause the within and foregoing printed transcript thereof and the proctors for the appellee having satisfied themselves of the completeness and correctness of said printed record,

Now, Therefore, pursuant to the rules of the above entitled Court, it is hereby stipulated by and between the above named Pacific Export Lumber Company, libelant and appellee, and the above named Osaka Shosen Kaisha and United States Fidelity & Guaranty Company, appellants, through their respective proctors that the within and foregoing printed record, or apostles on appeal, to wit: Pages numbered 1 to 1029 inclusive tendered

to the Clerk of the District Court of the United States for the District of Oregon for certification, is a full, true and correct transcript of all of the record, papers and proceedings had and taken in the above entitled court in the above entitled cause including all of the matters and things required by the stipulations and orders as to record of the dates of October 28th and November 20th, 1920, and including all the exhibits except "Libelant's Exhibit M," "Libelant's Exhibit N," "Libelant's Exhibit R," (also marked "Libelant's Exhibit B Yamamoto"), "Claimant's Exhibit A," "Claimant's Exhibit C," "Claimant's Exhibit D," "Claimant's Exhibit E," "Claimant's Exhibit H," "Claimant's Exhibit I," "Claimant's Exhibit J," "Claimant's Exhibit K," "Claimant's Exhibit I-L," "Claimant's Exhibit Yamamoto No. 1," "Claimant's Exhibit Yamamoto No. 2," "Claimant's Exhibit Yamamoto No. 4," "Claimant's Exhibit Yamamoto No. 5," "Claimant's Exhibit Yamamoto No. 6," "Claimant's Exhibit Yamamoto No. 7," "Claimant's Exhibit Yamamoto No. 8," "Claimant's Exhibit Yamamoto No. 9," "Claimant's Exhibit Yamamoto No. 10," "Claimant's Exhibit Yamamoto No. 11" and "Libelant's Exhibit B Yamamoto" (also marked "Libelant's Exhibit R"); as to all of which enumerated exhibits the parties hereto have stipulated, and the above entitled court has ordered that the originals thereof may be sent up to the United States Circuit Court of Appeals for the Ninth Circuit in lieu of printed copies and that none of said exhibits shall

be printed; and it is further stipulated that said printed apostles may be transmitted to the said United States Circuit Court of Appeals as the whole of the record required to be transmitted in printed form to said Circuit Court of Appeals, and that the clerk of the above entitled court shall certify the foregoing printed transcript in accordance with this stipulation and without comparison with the original thereof.

Dated at Portland, Oregon, this 30th day of November, 1920.

ERSKINE WOOD,

WOOD, MONTAGUE & MATTHIESSEN,

Proctors for Libelant and Appellee.

FRANK A. HUFFER,

HUFFER & HAYDEN,

Proctors for Appellants.

Filed Nov. 30, 1920. G. H. Marsh, Clerk.

*In the District Court of the United States for
the District of Oregon.*

No. 7467.

CERTIFICATE OF CLERK.

PACIFIC EXPORT LUMBER COMPANY, a cor-
poration, Libelant-Appellee,

v.

THE JAPANESE STEAMER "SAIGON MARU,"
her tackle, apparel, etc., Respondent,

OSAKA SHOSEN KAISHA, a corporation of
Japan, Claimant-Appellant,

UNITED STATES FIDELITY & GUARANTY
COMPANY, Appellant.

UNITED STATES OF AMERICA, }
District of Oregon. } ss.

The proctors for the respective parties to the within and foregoing entitled cause, having stipulated that the within printed transcript of record, as prepared, compared and tendered to me for certification by the proctors for appellants herein, is a full, true and correct transcript of all the record, papers and proceedings had and taken in the above entitled court in the above entitled cause, including all of the matters and things required by the stipulations and orders as to record of the dates of October 28 and November 20, 1920, and including all exhibits saving and excepting only "Libelant's Exhibit M," "Libelant's

Exhibit N," "Libelant's Exhibit R" (also marked "Libelant's Exhibit B Yamamoto"), "Claimant's Exhibit A," "Claimant's Exhibit C," "Claimant's Exhibit D," "Claimant's Exhibit E," "Claimant's Exhibit H," "Claimant's Exhibit I," "Claimant's Exhibit J," "Claimant's Exhibit K," "Claimant's Exhibit I-L," "Claimant's Exhibit Yamamoto No. 1," "Claimant's Exhibit Yamamoto No. 2," "Claimant's Exhibit Yamamoto No. 4," "Claimant's Exhibit Yamamoto No. 5," "Claimant's Exhibit Yamamoto No. 6," "Claimant's Exhibit Yamamoto No. 7," "Claimant's Exhibit Yamamoto No. 8," "Claimant's Exhibit Yamamoto No. 9," "Claimant's Exhibit Yamamoto No. 10," "Claimant's Exhibit Yamamoto No. 11," and "Libelant's Exhibit B Yamamoto," and all the parties hereto having stipulated, and the district court having ordered that the originals of said enumerated exhibits be sent up to the United States Circuit Court of Appeals in lieu of printed copies thereof and that none of said exhibits be printed, which stipulations and orders are set forth in said apostles on appeal; and the said proctors having further stipulated that I shall certify the foregoing printed transcript in accordance with said stipulation and without comparison thereof:

Now, Therefore, in accordance with the said stipulation and the rules of the above entitled court, I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing printed pages from 1

to 1029, inclusive, are a full, true and correct transcript of all the record, papers and proceedings had and taken in the above entitled court in the above entitled cause as the originals thereof appear on file and of record in my office and in my custody, including all the exhibits referred to therein, saving and excepting only the exhibits hereinbefore specifically enumerated, and also including all of the papers, proceedings, matters and things required to be made a part of the apostles on this appeal by the stipulation and order as to record of October 28th, 1920, as modified by the stipulation and order as to record of the date of November 20th, 1920.

And I further certify and return that in accordance with said stipulations and orders as to record, I have transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, as a part of the record of said cause on appeal, the originals of all of the exhibits introduced in evidence in said cause, and that I have also transmitted to said clerk at said place the original orders of the Honorable Charles E. Wolverton, District Judge, and Wm. B. Gilbert, Circuit Judge, dated respectively November 15th, 1920, and November 19th, 1920, extending and enlarging the time for filing the record on appeal in said circuit court of appeals until and including December 15, 1920. and order of said Cir. Judge

And I further certify and return that I hereto attach the original Citation on Appeal.

I further certify that the following is a full, true and correct statement of all the costs, expenses, fees and charges incurred and paid in my office and on behalf of the appellants herein for making record and certificate on return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to wit:

For certificate of clerk to the foregoing transcript paid by appellants.....\$1.40

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said District Court at Portland, Oregon in said District; this 14th day of December, 1920.

[Seal of said District Court]

G. H. MARSH,

Clerk of the District Court of the United States, for the District of Oregon.

Service upon us of three (3) copies of the within printed Apostles on Appeal, consisting of two (2) volumes aggregating 1033 pages, is acknowledged at Portland, Oregon, this 14th day of December, 1920.

ERSKINE WOOD,

WOOD, MONTAGUE & MATTHIESSEN,

Proctors for Appellee.

[Endorsed]: Printed Apostles on Appeal. Filed December 17, 1920. F. D. Monckton, Clerk.

No. 3609

United States
Circuit Court of Appeals
For the Ninth Circuit.

OSAKA SHOSEN KAISHA, a Corporation, Claim-
ant of the Japanese Steamship "SAIGON
MARU," Her Tackle, Apparel, etc., and
UNITED STATES FIDELITY & GUAR-
ANTY COMPANY, a Corporation,
Appellants,

vs.

PACIFIC EXPORT LUMBER COMPANY, a
Corporation,
Appellee.

Upon Appeal from the United States District Court for
the District of Oregon.

PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.



In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 3609.

OSAKA SHOSEN KAISHA, a Corporation, Claim-
ant of the Japanese Steamship "SAIGON
MARU," Her Tackle, Apparel, etc., and
UNITED STATES FIDELITY & GUAR-
ANTY COMPANY, a Corporation,
Appellants,

vs.

PACIFIC EXPORT LUMBER COMPANY, a
Corporation,

Libelant and Appellee.

Notice of Filing of Apostles on Appeal.

To the Above-named Pacific Export Lumber Com-
pany, Appellee, and Erskine Wood and Wood,
Montague & Matthiessen, Its Proctors:

You and each of you will please take notice that
the record on appeal in the above-entitled cause has
been filed with the clerk of the United States Cir-
cuit Court of Appeals at San Francisco and the case
docketed in said court, and that the undersigned
have therein entered their appearance as the proctors
of appellants.

FRANK A. HUFFER,
WILLIAM H. HAYDEN and
GERALD H. BUCEY,

Proctors for said Appellants, Whose Office and P. O.
Address is: 410 Fidelity Building, Tacoma,
Washington.

[Endorsed]: Notice of Filing of Apostles on Appeal. Filed December 27, 1921. F. D. Monckton, Clerk.

Due service of the within Notice is hereby admitted this 23d day of December, 1920.

WOOD, MONTAGUE & MATTHIESSEN,
Proctors for Appellee.

At a stated term, to wit, the October Term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the sixteenth day of February, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3609.

OSAKA SHOSEN KAISHA, a Corporation,
etc., et al.,

Appellants,

vs.

PACIFIC EXPORT LUMBER COMPANY, a
Corporation,

Appellee.

Order of Submission.

ORDERED appeal in the above-entitled cause argued by Mr. Frank A. Huffer, proctor for appellants,

and by Mr. Erskine Wood, proctor for the appellee, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the ninth day of May, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN DECREES.

By direction of the Honorable William B. Gilbert, Erskine M. Ross, and William H. Hunt, Circuit Judges, before whom the causes were heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in each of the said causes in accordance with the opinion filed therein: * * * Osaka Shosen Kaisha, a Corporation, Claimant of the Japanese Steamship "Saigon Maru," Her Tackle,

Apparel, etc., and United States Fidelity & Guaranty Company, a Corporation, Appellants, vs. Pacific Export Lumber Company, a Corporation, Appellee.
No. 3609.

In the United States Circuit Court of Appeals for the
Ninth Circuit.

No. 3609.

OSAKA SHOSEN KAISHA, a Corporation, Claimant of the Japanese Steamship "SAIGON MARU," Her Tackle, Apparel, etc., and UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,
Appellants,

vs.

PACIFIC EXPORT LUMBER COMPANY, a Corporation,

Libelant and Appellee.

Opinion U. S. Circuit Court of Appeals.

Upon Appeal from the United States District Court
for the District of Oregon.

Before GILBERT, ROSS and HUNT, Circuit
Judges.

ROSS, Circuit Judge:

The appellant Steamship Company is a Japanese corporation and the owner of the steamship "Saigon Maru," on which it agreed by charter-party made with the appellee, a corporation of the State of Oregon, to carry from a port on the Columbia or

Willamette River a full cargo of lumber, including a full deckload, to Bombay, India, and there deliver the same to parties to whom the appellee contracted to sell and deliver it. The other appellant is surety only. In pursuance of the terms of the charter-party the steamship came to Portland and there received from the appellee a full cargo of the lumber below deck, and 241,559 feet board measure on her deck, after which the captain of the ship refused to receive any more on the ground that it would not be safe to do so.

The Court below found and held that the ship could safely have taken on deck 308,441 additional feet of lumber, and for her failure to do so held her liable *in rem* for damages in the sum of \$2,453.65, with interest at the rate of six per cent per annum from August 2, 1917, for and on account of loss of profits suffered by the libelant by reason of the ship's failure to carry and deliver at Bombay the 308,441 additional feet of lumber, and in the further sum of \$5,192.86 for and on account of the claim for damages made against the libelant by the parties to whom the appellee had agreed to deliver the said additional 308,441 feet of lumber, with interest thereon at the rate of six per cent per annum from August 2, 1917, besides costs.

The record shows, and the trial Court so found in effect, that the 308,441 additional feet of lumber mentioned had not been sawed by the Mill Company from which the appellee had engaged it, because of the refusal of the captain to receive upon the

deck of the ship more than the 241,559 feet that he had already taken aboard.

The primary question in the case, therefore, is whether in such circumstances the appellee ever acquired any lien on the ship, growing out of the 308,441 feet that the captain refused to receive and carry, in view of the facts relating thereto.

The respective positions of the opposing proctors may be briefly stated: On the part of the appellee the contention is that by taking on board a portion of the cargo covered by the charter-party the ship thereby entered upon the performance of the contract and that a maritime lien thereupon arose against her and in favor of the libellant, not only as respects the portion so actually received, but also as respects the entire contemplated cargo; whereas the appellants insist that there can be no lien against or in favor of the ship as regards any portion of a contemplated cargo not actually placed on board, or in the custody of or under the control of the ship, and especially so in respect to such portion of the contemplated cargo as does not in fact exist. The proctors for the appellee concede that it is the settled law in this country that where the contract remains wholly executory, the ship is not liable *in rem* for any breach of it, but they urge that where she partly executes the contract, as by taking on board a part of the cargo, as was done in the present case, she thereby becomes liable *in rem* for all breaches of the contract.

The learned Judge of the court below sustained this position of the proctors for the appellee, citing in support of his ruling the cases of Scott vs. The

Ira Chaffee, 2 Fed. 401; The Hermitage, 12 Fed. Cas. 6410; The Williams, 29 Fed. Cas. 17,710; The Director, 26 Fed. 708; The Starlight, 42 Fed. 167; The Oscoda, 66 Fed. 347; The Helios, 108 Fed. 270; The Oceano, 148 Fed. 131; Wilson vs. Peninsula Bark & Lumber Co., 188 Fed. 52.

The contention of the appellants that the cases so cited are not here applicable we think not well founded. On the contrary, the last case there cited, Wilson vs. Peninsula Bark & Lumber Co., 188 Fed. 52, which is a decision by the Court of Appeals of the Sixth Circuit, while based upon a state statute—as appears from the record of that case, not, however, called to our attention until the petition for rehearing in the present case was filed—is, it seems to us, strikingly in point upon the question urged by the appellants, that the 308,441 feet of lumber had not been sawed prevented the lien claimed by the appellee from attaching to the ship. In that case the Court said:

“The controlling facts disclosed by the testimony are substantially as follows: The libelant had contracted to furnish certain hemlock timber at the Government’s locks in Sault Ste. Marie. It had purchased these timbers from the Worcester Company under a contract which required the latter company to deliver the timbers to the libelant, ‘f. o. b. water, delivered alongside boat at Chassel.’ It was necessary for the libelant to transport or cause to be transported the timber from Chassel to Sault Ste. Marie for delivery. For this purpose, on July 25, 1908,

the libelees entered into the following contract with the libelant;

“ ‘On the part of the owners of the steamer “Mathew Wilson,” we hereby agree to carry approximately one million feet of 12-12 hemlock timbers from Chassell, Mich., to Sault Ste. Marie, Mich.; said timbers to be delivered on or before November 15, 1908. The commencement of said delivery to be at your call in about ten days.

“ ‘The price for delivering said timber to be \$1.50 per M.

“ ‘Said timber to be received in sufficient water alongside of boat, either in rafts or cribs, and to be delivered at Sault Ste. Marie on dock as far away from the boat as the boom will reach; you to care for the timber as soon as it is cast from the boom.’

“ ‘The first notice that timber was ready for transportation, and the first call for the vessel was given and made by the charterer August 18, 1908, as appears from the following telegram, addressed to William Wilson:

“ ‘We chartered steamer Mathew Wilson some time ago, Chassell to Soo, Michigan, haul timber. No word since. Want to know at once when we can expect it. Three loads ready. Wire answer.’

“ ‘In response to this call, the vessel arrived at Chassell on Thursday, September 3d. After the hold was filled with certain lumber destined to Muskegon, which the vessel was at the time also engaged in transporting, they proceeded on

Friday, September 4th, in the afternoon to load the hemlock timbers on the deck of the vessel. The notice of August 18th stated that the charterer had 'three loads ready' yet because of the close inspection made by the representative of the Government as the timbers were being put aboard the vessel, and perhaps from some other causes not important, it resulted that there were only about 153,000 feet of timber then actually at Chassell ready for transportation. The timbers were put aboard Friday afternoon, Saturday, and Sunday morning up to 9 o'clock. A short time thereafter, and without demanding any additional timber to complete the cargo, the vessel sailed for the Sault."

The claim of the vessel there was that when first called by the libelant and notified that three loads of lumber were ready, it responded, and on arrival at Chassell found only a small portion of that amount ready, and because the libelant failed to furnish sufficient timber it was compelled to sail with a short cargo, and was therefore relieved from further performance under the charter. The Court, however, held against that claim, and sustained the libel for damages, just as the Court below did in the case now before us.

Originally, ships were held liable *in rem* under contracts of affreightment which were purely executory, but that rule was at an early day so modified in this country as to hold them so bound only after actually entering upon the performance of the contract. *The Ira Chaffee*, 2 Fed. 401; *The Monte*

A., 12 Fed. 331; The J. F. Warner, 22 Fed. 342; The Director, 26 Fed. 708; The Starlight, 42 Fed. 167; The Oscoda, 66 Fed. 347; The Eugene, 83 Fed. 222; *Id.* 87 Fed. 1001 (decision by this court); The Oceano, 148 Fed. 131. See, also, The Margaretha, 167 Fed. 794; Wilson et al. vs. Peninsula Bark & Lumber Co., 188 Fed. 52; The Helios, 108 Fed. 270.

The decision of the Circuit Court of Appeals of the First Circuit in the case of The S. L. Watson, and the Thomas P. Sheldon, 118 Fed. 945, is far from holding that a maritime lien does not lie against a ship for the breach of a contract where she has entered upon the performance thereof and performed it only in part. That such is not the doctrine of that decision is very clearly shown by the statement made by the Court (page 953) that it "might have reached the same conclusion by accepting that" of this court in the Eugene case above cited.

In the Watson and Sheldon cases the owner of the barges contracted that they should transport five cargoes of coal from Lambert's Point in Norfolk, Va., to Providence, R. I., at 80 cents per ton. It was stipulated that the barges should "take turns in loading, as customary," and that in case coal was not ready to load them when they reported for cargo, within a reasonable time, the owners should have the option of loading on other coal, and returning next trip to load under the charter. One cargo was loaded on each of the barges, was transported and properly delivered, but neither barge took on any portion of the cargo for which a lien *in rem* was claimed against them. The Court held that so far as the three re-

maining cargoes were concerned the contract was purely executory, saying:

“It has now become a settled practice, where several vessels make up a line, for the managers to make contracts that goods shall go forward by one or any other of the vessels of the line, depending on the times of arrival and other contingencies. It seems an extraordinary position, heretofore unheard of, that all the vessels of such a line can be held *in solido* for the breach of such contracts so far as executory, even if parts of the cargoes contracted for had been sent forward. Yet this is necessarily the fundamental principle underlying the position of the libellant in the cases before us. To permit liens to be sustained as claimed by it *in solido* against sundry vessels, would be to go entirely beyond the purpose of the admiralty law in granting them.

“The several vessels of a supposed line, and in this particular case, by analogy, the barges, so far as voyages not completed are concerned, are in no fault. The latter never entered into any contract, either expressly or by implication; but they well and truly performed such voyages as their owner directed them to perform. They should not be held liable for breaches of duty of merely their owners. * * * To permit liens such as are now claimed would go beyond the necessities of the admiralty law, would extend liens in violation of the principles stated by Mr. Justice Curtis in *The Kiersage*, and

would assess damages against a vessel not a party to a contract for a particular voyage either directly or by partial execution of that voyage. As to the latter proposition, we may well add that while, so far as the charterer and the owner of the barges were concerned, the charter was continuous, yet the vessels, being inanimate, could not, by the very nature of things, enter into a strictly executory contract. Each of them could be subjected to such duties only as might arise by implication of law from the circumstances of a voyage, or other concrete act, on which it had in fact entered; and therefore, as to them, each of the several voyages was logically independent and single."

True it is that the lien of the ship on the cargo for freight and expenses in connection with its carriage, and the lien of the cargo on the ship for its safe carriage and delivery, are very generally reciprocal, but in the nature of things such reciprocity does not and cannot exist in every case. This illustration of that fact is given by the appellee: "All agreements for the carriage of *persons* or property by vessels are contracts of affreightment." Benedict, 4th Ed., secs. 199, 201. Yet where a passenger takes passage on a vessel and the vessel receives him on board and commences the voyage, but fails to complete it, she is liable *in rem* for her failure. Obviously in such case such reciprocity does not exist, for there can be no lien on the passenger. The cases of *The Eugene*, 83 Fed. 222, and *Stone et al., vs. The Relampago*, Fed. Cas. No. 13,486, 23 Fed. Cas.

p. 158, and other cases there mentioned, are illustrations.

We have given very careful consideration to the arguments and the evidence regarding the refusal of the ship to take on her deck the 308,441 additional feet of lumber and carry it in accordance with her contract, and are of the opinion that we would not be justified in interfering with the finding and conclusion of the trial court respecting that matter. So, too, do we think we are concluded by the findings and conclusions of the learned judge upon the question of damages. To review the record upon the subject in detail would serve no useful purpose.

The judgment is affirmed.

[Endorsed]: Opinion. Filed May 9, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

No. 3609.

OSAKA SHOSEN KAISHA, a Corporation, Claim-
ant of the Japanese Steamship "SAIGON
MARU," Her Tackle, Apparel, etc., and
UNITED STATES FIDELITY & GUAR-
ANTY COMPANY, a Corporation,
Appellants,

vs.

PACIFIC EXPORT LUMBER COMPANY, a
Corporation,

Appellee.

Decree U. S. Circuit Court of Appeals.

Appeal from the District Court of the United States for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellants.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellants for its costs herein expended, and have execution therefor.

[Endorsed]: Decree. Filed and entered May 9, 1921. F. D. Monekton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the thirteenth day of June, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3609.

OSAKA SHOSHEN KAISHA, a Corporation,
Claimant of the Japanese Steamship
"SAIGON MARU," etc., et al.,
Appellants,

vs.

PACIFIC EXPORT LUMBER COMPANY, a
Corporation,
Appellee.

Order Denying Petition for Rehearing.

On consideration thereof, and by direction of the
Honorable William B. Gilbert, Erskine M. Ross, and
William H. Hunt, Circuit Judges, before whom the
cause was heard, it is ORDERED that the petition,
filed June 6, 1921, on behalf of the appellants for
a rehearing of the above-entitled cause be, and hereby
is denied.

United States Circuit Court of Appeals for the
Ninth Circuit.

No. 3609.

OSAKA SHOSEN KAISHA, etc., et al.,
Appellants,

vs.

PACIFIC EXPORT LUMBER COMPANY, a
Corporation,
Appellee.

Order Staying Issuance of Mandate, etc.

Upon application of counsel for the appellants, and good cause therefor appearing, ORDERED mandate stayed to and including July 11, 1921, on condition that petition for writ of certiorari to be made to the Supreme Court of the United States be filed and docketed in said Supreme Court within the time so extended and submitted to the said Supreme Court on the first motion day thereof, and in that event the said mandate in each of the above-entitled causes be stayed until after the determination of said petition.

Dated: San Francisco, California, June 13, 1921.

WM. H. HUNT,

United States Circuit Judge.

[Endorsed]: Order Staying Issuance of Mandate, etc. Filed June 13, 1921. F. D. Monekton, Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

No. 3609.

OSAKA SHOSHEN KAISHA, a Corporation,
Claimant of the Japanese Steamship
"SAIGON MARU," Her Apparel, etc., and
UNITED STATES FIDELITY & GUAR-
ANTY COMPANY, a Corporation,

Appellants,

vs.

PACIFIC EXPORT LUMBER COMPANY, a
Corporation,

Appellee.

Praeceptum for Transcript of Record.

To the Clerk of the said Court:

Sir: Please make and furnish me with a certified printed Transcript of the Record (including the proceedings had in said Circuit Court of Appeals), and not less than nine uncertified copies thereof, for use on an application to be made to the Supreme Court of the United States for the issuance of a writ of certiorari under section 240 of the Judicial Code, in the above-entitled cause, the said transcript to consist of a copy of the following:

1. Printed Transcript of Record on which the cause was heard in said Circuit Court of Appeals, to which will be added a printed copy of the following entitled proceedings that were had, and of the papers that were filed in said Circuit Court of Appeals, viz.:

2. Notice of filing of apostles on appeal, filed December 27, 1920.

3. Order of submission, entered February 16, 1921.

4. Order directing filing of opinion, etc., entered May 9, 1921.

5. Opinion, filed May 9, 1921.

6. Decree, filed and entered May 9, 1921.

7. Order denying petition for rehearing, entered June 13, 1921.

8. Order staying issuance of mandate, filed June 13, 1921.

9. Praeceptum for transcript of record, filed June 20, 1921.

10. Certificate of Clerk U. S. Circuit Court of Appeals to said Transcript. bs

FRANK A. HUFFER,
WILLIAM H. HAYDEN,
GERALD H. BUCEY,

Counsel for Appellants.

Service of a copy of the within praecipe is hereby admitted this 16th day of June, A. D. 1921.

ERSKINE WOOD,
Counsel for Appellee.

[Endorsed]: Praecipe for Transcript of Record.
Filed June 20, 1921. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit.

No. 3609.

OSAKA SHOSEN KAISHA, a Corporation, Claimant of the Japanese Steamship "SAIGON MARU," Her Tackle, Apparel, etc., and UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,
Appellants,

vs.

PACIFIC EXPORT LUMBER COMPANY, a Corporation,
Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Record Certified Under Section 3 of Rule 37 of the Rules of the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one thousand and fifty-four (1054) pages, numbered from and including 1 to and including 1054, comprised in two volumes marked, respectively, Volume I and II, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, excluding all original exhibits, made pursuant to praecipe of counsel for the appellants, filed June 20, 1921, and certified under section 3 of Rule 37 of the Rules of the Supreme Court of the

United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 24th day of June, A. D. 1921.

[Seal]

F. D. MONCKTON,

Clerk.

By Paul P. O'Brien,
Deputy Clerk.

UNITED STATES OF AMERICA, ss.:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Osaka Shosen Kaisha, Claimant of the Japanese Steamship "Saigon Maru," her tackle, apparel, etc., and United States Fidelity & Guaranty Company, are appellants, and Pacific Export Lumber Company is appellee, No. 3609, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the District of Oregon, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-second day of October, in the year of our Lord one thousand nine hundred and twenty-one.

WM. R. STANSBURY,

Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 28,382. Supreme Court of the United States, No. 427, October Term, 1921. Osaka Shosen Kaisha et al., vs. Pacific Export Lumber Company. Writ of Certiorari. No. 3609. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 14, 1921. F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3609.

OSAKA SHOSEN KAISHA, a Corporation, Claimant of the Japanese Steamship "Saigon Maru," Her Tackle, Apparel, etc., and United States Fidelity & Guaranty Company, a Corporation, Appellants,

vs.

PACIFIC EXPORT LUMBER COMPANY, a Corporation, Appellee.

Stipulation as to Return to Writ of Certiorari.

It is hereby stipulated that the transcript already filed, in the clerk's office of the Supreme Court of the United States, with the petition for the writ of certiorari, shall be taken as the return to said writ

dated October 22, 1921, and that all the original exhibits on file in the office of the clerk of the Circuit Court of Appeals shall be transmitted to the clerk of the Supreme Court upon the return to said writ, without any further printing thereof.

Dated November 10th, 1921.

FRANK A. HUFFER,
WILLIAM H. HAYDEN AND
G. H. BUCEY,
Counsel for the said Appellants.
ERSKINE WOOD,
Counsel for the said Appellee.

[Endorsed:] Stipulation as to Return to Writ of Certiorari. Filed November 14, 1921. F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3609.

OSAKA SHOSEN KAISHA, a Corporation, Claimant of the Japanese Steamship "Saigon Maru," Her Tackle, Apparel, etc., and United States Fidelity & Guaranty Company, a Corporation, Appellants,

vs.

PACIFIC EXPORT LUMBER COMPANY, a Corporation, Appellee.

Certificate of Clerk U. S. Circuit Court of Appeals to Stipulation as to Return to Writ of Certiorari from the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the preceding page to be a full, true and correct copy of a "Stipulation as to Return to Writ of Certiorari," filed in the above entitled cause on the 14th day of November, A. D. 1921, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 16th day of November, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,
By PAUL P. O'BRIEN,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3609.

OSAKA SHOSEN KAISHA, a Corporation, Claimant of the Japanese Steamship "Saigon Maru," Her Tackle, Apparel, etc., and United States Fidelity & Guaranty Company, a Corporation, Appellants,

vs.

PACIFIC EXPORT LUMBER COMPANY, a Corporation, Appellee.

Return to Writ of Certiorari.

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court, in obedience to the annexed writ of certiorari, issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said writ of certiorari copy of:

Stipulation as to Return to Writ of Certiorari, the original of which said Stipulation was filed in said cause on the 14th day of November, A. D. 1921; and

the following original exhibits filed in said cause on December 22, 1920:

Libellant's Exhibits A to R, inclusive, and U to W, inclusive (Exhibit R the same as Yamomoto Libellant's Exhibit B);

Claimant's Exhibits A, C, D, E, and G to O, inclusive (Exhibit L identical with Exhibit I);

Yamomoto Exhibits, Libellant's A to B (B same as libellant's Exhibit R); Claimant's 1 to 11 inclusive;

Yano Exhibit A (with deposition attached);

Kawamoto Exhibit A (with deposition attached),

and in accordance with said stipulation, do hereby send the same to the said Supreme Court as the Return to the said Writ of Certiorari.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 16th day of November, A. D. 1921.

[Seal of United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk,

By PAUL P. O'BRIEN,
Deputy Clerk.

[Endorsed:] 427/28,382.

[Endorsed:] File No. 28,382. Supreme Court U. S., October Term, 1921. Term No. 427. Osaka Shosen Kaisha et al., Petitioners, vs. Pacific Export Lumber Co. Writ of certiorari and return. Filed Nov. 22, 1921.

(5387)

IN THE
SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1921.

OSAKA SHOSEN KAISHA, a Corpora-
tion, and UNITED STATES FIDELITY
& GUARANTY COMPANY, a Corpora-
tion,

Petitioners, No. [REDACTED]

VS.

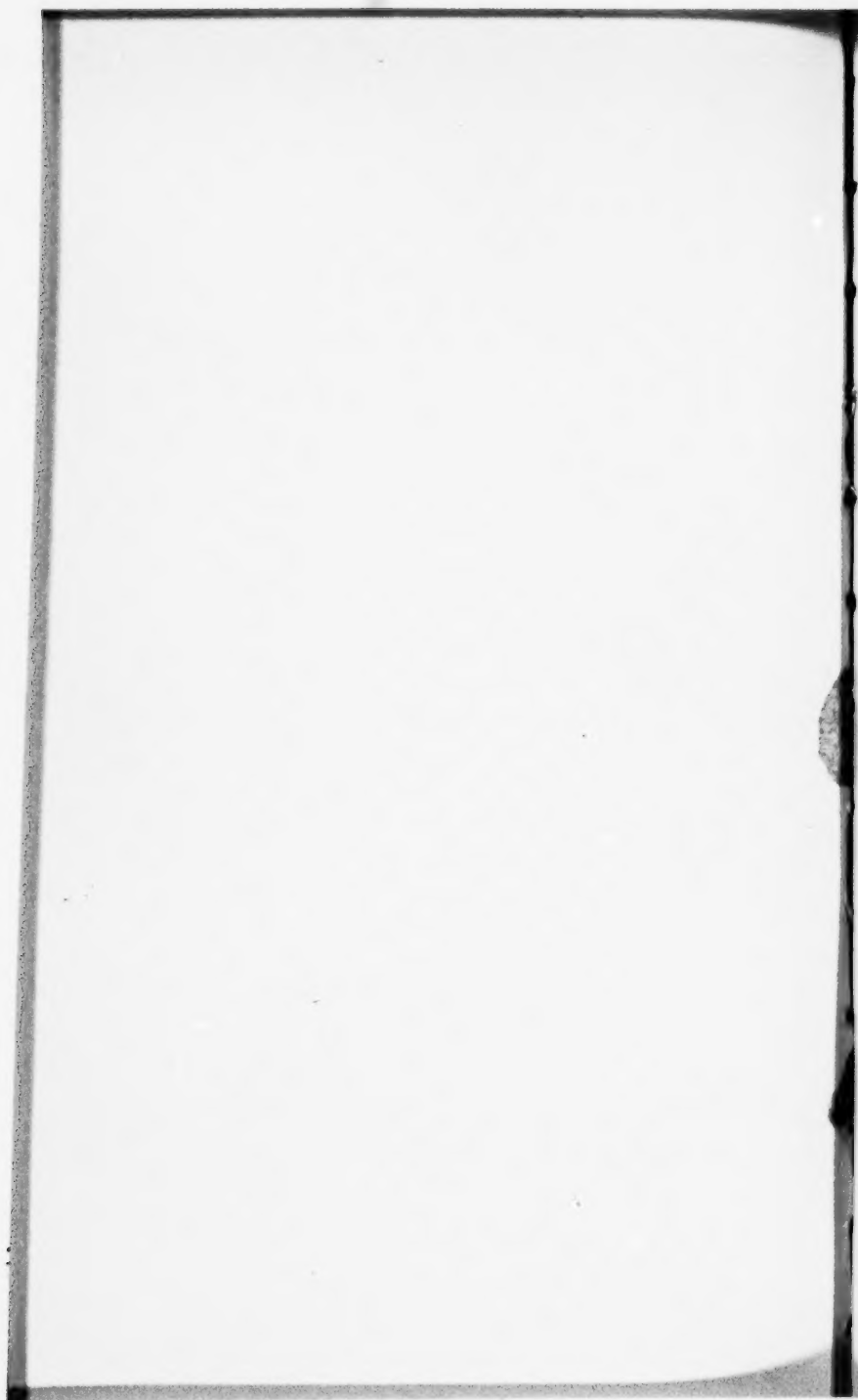
PACIFIC EXPORT LUMBER COMPANY, a
Corporation,

Respondent.

ON PETITION FOR WRIT OF HABEAS CORPUS
TO THE CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

PETITION, BRIEF AND COPY OF OPINION
OF THE CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

FRANK ADAMS HUTTEN,
Seattle, Washington;
WILLIAM H. HAYDEN,
Seattle, Washington;
GERALD H. BUCEY,
Tacoma, Washington;
Counsel for Petitioners.



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IN THE
SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1921.

OSAKA SHOSEN KAISHA, a Corpora-
tion, and UNITED STATES FIDELITY
& GUARANTY COMPANY, a Corpora-
tion,

Petitioners,

No.

VS.

PACIFIC EXPORT LUMBER COMPANY, a
Corporation,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

**PETITION, BRIEF AND COPY OF OPINION
OF THE CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

TO THE HONORABLE
THE CHIEF JUSTICE AND ASSOCIATE JUS-
TICES OF THE SUPREME COURT OF THE
UNITED STATES:

The petition of Osaka Shosen Kaisha, a Japanese
corporation, and United States Fidelity & Guar-
anty Company, a corporation of the State of Mary-

land, respectfully shows unto the court as follows:

First. This was a libel *in rem* filed in the District Court of the United States for the District of Oregon by the respondent, Pacific Export Lumber Company, a corporation of the state of Oregon, hereinafter called the "Libelant," against the Japanese steamship "Saigon Maru" to recover damages for her alleged failure to carry a "full cargo" of lumber from Portland, Oregon, to Bombay, India, pursuant to a written contract of affreightment between libelant and the petitioner Osaka Shosen Kaisha, hereinafter called the "Claimant". (Record—pp. 6, 38, and 976).

Second. Liability on the part of the vessel was asserted upon the ground that, after having taken on board a full under-deck cargo and, as claimed by libelant, only part of a full deckload, she refused to take on deck any additional amount. This additional amount had not been manufactured—had no physical existence—and, therefore, was not, and could not at any time have been in the possession of the ship or in charge of any of its officers, and the courts below so found (R. 437, 87-88, 1002-3, 1041). This claim of liability *in rem* was based on two grounds:

- (1) Upon the general admiralty law;
- (2) Upon a statute of the State of Oregon which provides that—

"Every boat or vessel used in navigating the waters of this state, or constructed in this state, shall be liable and subject to a lien * * *

4 For all demands or damages accruing from the non-performance or malperformance of any contract of affreightment, or of any contract touching the transportation of persons or property, entered into by the master, owner, agent, or consignee of the boat or vessel on which such contract is to be performed, and for damages or injuries done to persons or property, by such boat or vessel, and for damages or injuries by such boat or vessel resulting in the death of any person." Olson's "Laws of Oregon," Section 10281.

The District Judge held that the vessel should have taken on deck an additional amount of 308,441 feet and, for her failure so to do, held her liable *in rem* for damages under the general admiralty law, and, in this holding, he was sustained on appeal by the Circuit Court of Appeals. (R. 24-26, 886-912, 1040-1049).

Third. The libelant was engaged in the lumber export business at Portland, Oregon. The claimant was a Japanese Steamship Corporation and the owner of the S. S. "Saigon Maru." The "Saigon Maru" was a British-built tramp steamer and was, during all the times herein mentioned, in the possession of, and owned and operated by claimant. She was at all of said times a Japanese vessel and not a vessel of the State of Oregon nor used in navigating the waters of said state nor constructed in said state. At the time of the execution of the charter party, she was at Singapore and, with the exception of the voyage in question, had never

4

been on the Pacific Coast of North America. (R. 652, 78, 976, 714, 787, 799, 800).

Fourth. On March 20, 1917, the contract of af-freightment in question was entered into between libelant and claimant. It provided for the chartering of the whole of said vessel, including the deck (with exceptions immaterial here) "or sufficient room for" "a full cargo of sawn lumber and | or timber" to be carried from "a usual safe loading place on the Columbia or Willamette river to Bombay, India," and *libelant agreed to pay claimant as freight thereon 240 shillings per thousand feet board measure.* It was executed on behalf of claimant by its local agent at Tacoma, Washington, and not by the master of the vessel. (R. 976).

Fifth. The vessel arrived in Tacoma, Washington, the latter part of May, 1917, where she coaled for the intended voyage and, on May 25th, she went to Portland, Oregon, to take on the agreed cargo. Arriving there on May 26th, she proceeded immediately to the wharf of the Inman-Poulsen Lumber Company's mill and began loading. The lumber for the latter part of the cargo was there sawed as it was being loaded. After the vessel had taken under deck 2,436,851 feet, which libelant concedes was a full under-deck cargo, and, in addition, had taken on deck 241,559 feet, Captain Yamamoto, the master of the vessel, refused to take any more on deck, believing any additional amount would render his vessel unseaworthy on account of her being naturally of a tender model and also on account of the lo-

cation, character and exposed condition of her steering gear. Libelant insisted that she could carry on deck 508,441 feet in addition to the 241,559 feet already loaded thereon and demanded of the captain that he load such additional quantity. But the captain persisted in his refusal to take any more on deck.

Sixth. Thereupon, on June 4, 1917, libelant filed its libel against the vessel, alleging the execution of the charter party and the refusal of the captain to take any additional cargo on deck and claiming damages in the sum of \$15,000. (R. 6-9). Immediately thereafter claimant caused the vessel to be released by filing its bond in the sum of \$30,000 with the petitioner, United States Fidelity & Guaranty Company, as surety. On the same day, the "Saigon Maru," laden with the above described lumber, sailed for Bombay, where she arrived in due course on August 2nd and delivered the whole of said cargo. This voyage took her through the China Sea in the typhoon season and through the Indian Ocean in the monsoon season. There is no controversy with respect to this lot of lumber, as it was carried safely to destination.

Seventh. Claimant filed exceptions to the libel on the ground, among others, that the facts therein stated were insufficient to create a lien upon the vessel, either under the general maritime law or under the Oregon statute, or to show any right to proceed *in rem* against the vessel. (R. 13-16, 17-23).

In overruling these exceptions the District Judge filed a written opinion (R. 24-26), in which, while conceding that there is no lien under the general admiralty law for the breach of a contract of affreightment which is wholly executory, he held that where a part of the goods agreed by the vessel owner to be carried was laden, this gave the owner of the goods a lien under the general admiralty law upon the vessel for the failure to carry the remainder; that "where there has been performance in part by the ship, *such as in the present case*, in taking and receiving on board part of the cargo engaged to be carried or in doing any other act evidentiary of the fact of entering upon the discharge of the contractual engagement," the vessel is liable for failure to carry the remainder of the agreed cargo.

This holding your petitioners contend to be erroneous.

Eighth. Thereafter libelant filed an amended libel (R. 37-43) containing substantially the same allegations as in the original libel, but, in more particular statement of the nature and amount of its alleged damages, it averred therein that 5500 tons of the agreed cargo (3,300,000 ft.), 10 per cent. more or less, had been sold to the Bombay lumber firm of Gillanders-Arbutnot & Co.; that at the time of making of the charter party claimant knew that the vessel was being chartered for the express purpose of performing this agreement; that libelant was damaged in the sum of \$4044.65 for loss of

profits directly sustained by libelant on account of said sale contract and \$6,800 on account of having subjected itself to liability to the Bombay firm for its failure to deliver to them the full amount called for in its contract with that firm.

On October 28, 1919, claimant filed its exceptions to the amended libel, on substantially the same grounds as specified by it in its exceptions to the original libel (R. 43-51). These exceptions also were overruled. (R. 52-53).

Ninth. Claimant in its answer to the amended libel (R. 53-65), denied that it refused to carry a full cargo, and also all the allegations relating to the Bombay sale and the claims for damages therefrom, and alleged affirmatively the facts hereinbefore stated as to the place of construction of said vessel and its nationality and the ownership, possession and operation thereof by claimant; and further, that after 241,559 feet of lumber had been laden on deck, the master of the vessel, who was thoroughly familiar therewith and the waters she was to traverse, acting in the premises in good faith and for the good of all concerned and in the exercise of his sound discretion and judgment as such master, declined to take on deck any additional cargo, believing, in view of the length of the contemplated voyage and the dangerous seas to be traversed, that any greater deckload was unsafe and would render said vessel unseaworthy.

Tenth. On August 16, 1920, after final hearing, the District Judge handed down a written opinion

finding and holding that the vessel should have carried on deck 308,441 feet more than she did carry thereon, that *Captain Yamamoto in refusing to take any additional deckload was impelled by "no ulterior motive," "but, obviously, he was unduly timid and committed an error in judgment, all in good faith on his part"*; that libelant suffered damages by reason of the vessel's failure to carry this additional 308,441 feet in the sum of \$2,453.65 as the amount of profits libelant would have made upon its contract of sale to the Bombay firm of Gillanders, Arbuthnot & Company, and the further sum of \$5,192.86 as the amount of libelant's liability to the Bombay firm for libelant's failure to perform its sale contract with that firm, together with interest on said amounts from August 2, 1917; and, further, that the vessel was liable *in rem* for these items of damage. (R. 886-912). Thereafter on October 20, 1920, a judgment was accordingly entered against claimant and its surety, the petitioner, United States Fidelity & Guaranty Company. (R. 927-929, 934-935).

Eleventh. Upon appeal the Circuit Court of Appeals affirmed this judgment in all particulars.

In sustaining the claim of liability *in rem* under the general admiralty law, the appellate court cited and approved the cases cited by the District Judge on this question, saying:

"The contention of the appellants that the cases so cited are not here applicable we think not well founded. On the contrary, the last case there cited,

Wilson vs. Peninsula Bark & Lumber Co., 188 Fed. 52, which is a decision by the Court of Appeals of the Sixth Circuit, while based upon a state statute—as appears from the record of that case not, however, called to our attention until the petition for rehearing in the present case was filed—is, it seems to us, strikingly in point upon the question urged by the appellants, that the 308,441 feet of lumber had not been sawed prevented the lien claimed by the appellee from attaching to the ship.” (R. 1043).

* * * * *

“True it is that the lien of the ship on the cargo for freight and expenses in connection with its carriage, and the lien of the cargo on the ship for its safe carriage and delivery, are very generally reciprocal, but in the nature of things such reciprocity does not and cannot exist in every case. This illustration of that fact is given by the appellee: ‘All agreements for the carriage of *persons* or property by vessels are contracts of affreightment.’ Benedict, 4th Ed., Secs. 199, 201. Yet where a passenger takes passage on a vessel and the vessel receives him on board and commences the voyage, but fails to complete it, she is liable *in rem* for her failure. Obviously in such case such reciprocity does not exist, for there can be no lien on the passenger. The cases of *The Eugene*, 83 Fed. 222, and *Stone, et al. vs. The Relampago*, Fed. Cas. No. 13,486, 23 Fed. Cas. p. 158, and other cases there mentioned, are illustrations.” (R. 1048).

Your petitioners contend that the cases above

referred to as having been cited and approved by the Circuit Court of Appeals are either not in point or declare rules contrary to the court's holding, and that the court's holding is erroneous.

The issues as to the amount of deckload and the measure of damages, the Circuit Court of Appeals disposes of by saying:

"We have given very careful consideration the arguments and the evidence regarding the refusal of the ship to take on her deck the 308,441 additional feet of lumber and carry it in accordance with her contract, and are of the opinion that we would not be justified in interfering with the finding and conclusion of the trial court respecting that matter. So, too, do we think we are concluded by the findings and conclusions of the learned judge upon the question of damages. To review the record upon the subject in detail would serve no useful purpose." (R. 1049).

Twelfth. As both the trial and appellate courts held that libellant had a lien under the general admiralty law, neither of them considered the question of a lien under the Oregon statute.

Thirteenth. As to the amount of deckload and liability for alleged shortage:

The court's decision as to the maximum amount of deckload the vessel could safely carry is against the overwhelming preponderance of the testimony and its holding that the vessel was liable for fail-

ure to carry additional cargo is based on erroneous principles.

Fourteenth. As to the above mentioned item of \$2,453.65 for lost profits:

The court arrived at this amount by deducting from the sale price to libelant's Bombay purchaser the sum of the price libelant actually paid for the lumber in Portland in the month of March preceding and the cost of getting the lumber to Bombay. This Portland purchase was made nearly three months before the vessel left Portland and nearly five months before she reached Bombay, at both of which times the market price of such lumber at Portland was \$8.50 per thousand in excess of said March purchase price; and *it is undisputed that claimant had no knowledge or information as to this March purchase at the time of making the contract, having learned of it for the first time at the trial upon the cross-examination of Mr. Wheelwright, libelant's general manager* (R. 354, 437 at bottom). Upon the basis of this March purchase price, the District Court ascertained the "loss of profits" on the lumber not shipped at the rate of \$7.955 per M feet, or a total of \$2,453.65, saying:

"Objection is made that libelant purchased the lumber in this port in March at a much lower figure than could have been procured in June, when the vessel sailed, or on August 2nd, when the cargo arrived at Bombay. But it is a sufficient answer to this that the lumber was purchased for the 'Sai-

gon Maru's' cargo, and the rate of loss named was the actual damage sustained by the claimant's failure to carry. *Such are the damages which were legally in the contemplation of the parties when the charter party was entered into.*" (Rec. 910-911 and 123).

Your petitioners contend that the Portland market price on August 2, and not the March purchase price, was the proper basis for the computation, and that the March purchase price was not in the contemplation of the parties at the time of making the contract.

Inasmuch as the Circuit Court of Appeals, in its opinion, approved and considered itself "concluded" by the findings and conclusions of the District Court on the questions relating to the measure of damages, we shall treat the findings and conclusions of the latter court on this subject as those of the former.

Fifteenth. As to the above item of \$5,192.86 allowed on account of libelant's liability to the Bombay firm:

Prior to the execution of the charter party, libelant had been negotiating by letter and cable with the Bombay firm of Gillanders-Arbutnot & Co. for the sale to them of a cargo of lumber and, during the same time, was negotiating with claimant for the charter of the "Saigon Maru" to carry the lumber in case the sale was made. Claimant knew that negotiations for the sale of a quantity of lumber were being carried on by libelant with parties

in the Orient and that the "Saigon Maru," if chartered, was to be used in transporting it to destination. But claimant did not know who these Oriental purchasers were nor any of the terms of the proposed sale. As soon as libelant had by cable closed its sale to the Bombay people, it accepted the charter of the vessel. The District Judge held that claimant's knowledge concerning this sale was sufficient to charge it with liability for libelant's liability to the Bombay people for its failure to fully perform its contract with them. (R. 909, 910, 912). The amount of this liability the court fixed at \$5,192.86. (R. 928). This item should not have been allowed, as it was not in the contemplation of the parties at the time the contract was made, and is too remote, speculative and contingent to be recoverable.

Sixteenth. The Circuit Court of Appeals erred—

(1) In holding that the "Saigon Maru" was liable *in rem* for her refusal to carry on deck an additional amount of cargo;

(2) In holding that the taking and receiving on board of the lumber that was actually carried was such part performance of the affreightment contract as to make the vessel liable *in rem* for refusal to carry any additional quantity of lumber required by the terms of said contract to be carried;

(3) In finding that the "Saigon Maru" could have carried on deck an additional cargo of 308,441 feet;

(4) In holding that the refusal of Captain

Yamamoto to carry on deck such additional cargo constituted a breach of the charter party;

(5) In disregarding, and in not giving sufficient weight to the decision of the master of the "Saigon Maru" as to the maximum amount of deck-load she could safely carry and in substituting therefor the court's own opinion on said matter, notwithstanding the fact that said captain was shown to have been thoroughly competent and acquainted with his vessel and the waters it was to traverse and the further fact that the court, in its opinion, failed to find that the captain was incompetent or abused his discretion;

(6) In adopting and approving the finding and holding of the trial court that the loss of profits sustained by libelant was at the rate of \$7.955 per thousand feet or the total sum of \$2,453.65 (R. 910, 1049), and in so finding and holding;

(7) In adopting and approving the use by the trial court as a basis for the calculation of libelant's loss of profits of the price actually paid by libelant in March, 1917, and the refusal of said court to take as such basis the market value at Portland, Oregon, on August 2, 1917, the date when the left-behind "lumber" would have arrived at Bombay; and also the trial court's holding that the proper basis for said purpose was said purchase price and not said market value; and also in using as such basis said purchase price and not said market value and in holding that the former and not the latter was the proper basis (R. 910, 911, 1049);

(8) In adopting and approving the finding and holding of the trial court that the purchase price paid by libelant for the lumber in question in March preceding the departure of the vessel from Portland and its damages as based thereon were legally in contemplation of the parties when the charter party was entered into, and in so finding and holding (R. 911, 1049);

(9) In adopting and approving the finding and holding of the trial court that it was not essential, in order to charge claimant with special damages arising out of the sale contract to the Bombay firm, that claimant should have been advised of the terms and conditions of said contract and that it was sufficient that claimant had knowledge of the fact that such a sale was in contemplation dependent upon securing the charter party, and in so finding and holding (R. 910, 1049);

(10) In adopting and approving the finding and holding of the trial court that the claim for damages asserted against libelant by Gillanders-Arbuthnot & Co. was within the contemplation of the parties at the time of the execution of the charter party, and in so finding and holding (R. 911, 1049);

(11) In adopting and approving the finding and holding of the trial court that libelant's liability to the firm of Gillanders-Arbuthnot & Co. on account of the breach of libelant's sale contract with that firm amounted to the sum of \$5,192.86, and in so finding and holding (R. 911, 928, 1049);

(12) In adopting the conclusion of the trial court that libelant was entitled to recover for and on account of said liability the said sum of \$5,192.86, and in so holding (R. 928, 1049);

Seventeenth. The decision of the Circuit Court of Appeals on the question of libelant's right to a lien under the general admiralty law should be reviewed for the following reasons:

(1) It is in conflict with the principles declared by this court and by other federal courts of high authority, as well as by the jurists of continental Europe.

(2) It is based on cases either not in point or actually holding to the contrary, and, if not annulled by this court, the case at bar will not only itself stand as an unsound and misleading authority on an important question of admiralty law and federal jurisdiction *in rem*, but will also tend to place and keep the courts whose opinions are cited in support of the decision in the false position of having sanctioned the same erroneous doctrine. While the principles upon which your petitioners are basing their present contention have been frequently approved by this and other federal courts, this is the first reported case in which it has become necessary for any court to decide the precise question here involved. We submit, therefore, that it is of the utmost importance that the rules of law governing such cases as this should be correctly declared and that all decisions of inferior courts de-

claring or appearing to declare any contrary doctrine rendered innocuous.

(3) This question of liability *in rem* is of great and growing importance, not only to vessel-owners and shippers, but also to those whose business requires them on occasion to determine whether, in any given case, a vessel is, or is not, subject to a lien for failure to carry goods. It is well that the shipping and commercial world know as soon as possible and from the highest judicial authority whether, under the general admiralty law, a vessel is subject to secret maritime liens for failure to carry goods never placed, nor susceptible of being placed in any visible or other relation to it.

Eighteenth. The decision of the Circuit Court of Appeals should be reviewed also on other questions decided by said court, as follows:

(1) The courts below seem to have given but little weight to the decision of the master of the S. S. "Saigon Maru" as to the amount of deckload on the occasion of her loading at Portland, and to have ignored the rule that the decision of the master of a vessel on the question of its proper loading, when such decision is given honestly, in good faith and without any ulterior motive, should not be set aside by any court except upon the clearest showing of an abuse of discretion. The masters of vessels, charged as they are with responsibility for ships and other valuable property and for human lives, should be encouraged to err in doubtful cases on the side of safety and not to allow their reason-

able doubts as to their vessels' safety with a given load to yield to the importunities of avaricious shippers, in the fear that, if they do not so yield and it should transpire that they have been over-cautious, their ships or their owners may be mulcted in damages.

(2) Even assuming that the District Court had jurisdiction *in rem* and that the vessel was liable for failure to carry on deck an additional amount of 308,441 feet of lumber, a great injustice has been done your petitioners in that, on account of the application to the case of erroneous legal rules, the damages have been fixed at an excessive amount.

Nineteenth. It is respectfully submitted that writs of certiorari have been granted by this court to review cases in which the questions involved were of no greater gravity or importance than the present question of the vessel's liability *in rem* under the general admiralty law, to say nothing of the other legal questions involved and the excessive allowance of damages. The following is a list of a few of the most recent cases in which writs have been granted:

Seaboard Fisheries Co. vs. Piedmont & Georges Coal Co., 253 Fed. 20; 248 U. S. 556; 63 Law Ed. 419,

on the question as to whether, under the circumstances therein appearing, the furnisher of coal to certain vessels had a maritime lien thereon under the act of June 23, 1910;

South Coast Steamship Co. vs. Rudbach, 64 Law Ed. U. S. 386,

on the question as to whether a person furnishing supplies on the master's order to a chartered vessel in a domestic port on the credit of the vessel although notified by the owner not to do so was, under the terms of the charter party there in question, entitled to a lien on the vessel under the act of June 23, 1910;

The Atlanten, 64 Law Ed. (U. S.) 586,
on the construction of a charter party;

Luckenbach vs. McCahan Sugar Co., 63 Law Ed. (U. S.) 170,
on the question of the validity of an agreement between a shipper and his insurer for adjusting a loss by the latter making a loan to the former repayable to the extent only of any subsequent net recovery against the carrier;

Capitol Transportation Co. vs. Cambria Steel Co., 63 Law Ed. (U. S.) 631,
on a question of limitation of liability on the part of the ship-owner for loss of cargo;

Pendleton vs. Benner Line, 62 Law Ed. (U. S.) 770,
on a question of limitation of liability;

Chelentis vs. Luckenbach Steamship Co. 62 Law Ed. (U. S.) 1171,
on the question of the necessity of the application of the rules of the general admiralty law in actions at common law to enforce maritime rights.

Twentieth. A petition for a rehearing was in due season filed in said Circuit Court of Appeals and by said court denied on the 6th day of June,

1921, and the mandate of said court has been stayed to the 31st day of July, 1921, to admit of this application being made.

Twenty-first. Your petitioner herewith presents a certified copy of the entire record in said cause, including the proceedings in the Circuit Court of Appeals for the Ninth Circuit and the opinion of said court.

Wherefore, Your petitioners respectfully pray:

That a writ of certiorari be issued under the seal of this court, directed to the Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, commanding the said court to certify and send to this court on a day to be designated a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals for the Ninth Circuit had in said cause, to the end that the said cause may be reviewed and determined by this Honorable Court as provided by law and that the said judgment of the Circuit Court of Appeals for the Ninth Circuit be reversed by this Honorable Court;

And for such further relief as may seem proper.

And your petitioner will ever pray.

FRANK ADAMS HUFFER,
Seattle, Washington;

WILLIAM H. HAYDEN,
Seattle, Washington;

GERALD H. BUCEY,
Tacoma, Washington;
Counsel for Petitioners.

State of Washington, {
 County of King, { ss.

WILLIAM H. HAYDEN, being first duly sworn, on his oath deposes and says:

That he is one of the counsel for petitioners; that he has read the foregoing annexed petition and knows well the contents thereof; that he has also carefully read and studied a duly certified copy of the transcript of record which accompanies the petition herein, being the transcript of record in the case at bar; that the matters in said petition are in the judgment of this affiant duly supported in and by said transcript of record, and that he knows of the above proceedings had, and that the facts in said petition herein stated are true to the best of his knowledge and belief.

WILLIAM H. HAYDEN.

Subscribed and sworn to before me this 15th day of July, 1921.

(SEAL)

~~GERALD~~ H. BUCEY.

Notary public in and for the State of Washington, residing at Tacoma, Washington.

I do hereby certify that I have carefully examined the foregoing petition for a writ of certiorari and the allegations thereof are true, as I verily believe, and, in my opinion, the petition is well founded and the case is one in which the prayer of the petition should be granted by this court.

WILLIAM H. HAYDEN.

Counsel for Petitioners.

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.**

LIABILITY IN REM.

**NO LIEN UNDER THE GENERAL AD-
MIRALTY LAW.**

As we have stated in our petition, *supra*, and as the Circuit Court of Appeals found, the 308,441 feet of lumber which the "Saigon Maru" refused to carry was not in existence. *It is solely with this quantity of "lumber," which was not only never laden or placed in the custody of the master, but not even sawed, that we are now concerned.*

The District Court, in its opinion overruling claimant's exceptions to the libel, concedes that if no part of the agreed cargo of lumber had been put aboard, the vessel would not have been liable, saying:

"It is unquestioned that, since the cases of *The Freeman*, 18 How. 182, and *The Yankee Blade*, 19 How. 82, were decided by the Supreme Court, it has been regarded as settled law that a libel *in rem* will not lie for the breach of an executory contract while the same remains wholly unperformed." (R. 25).

The court held, however, that because a part of the agreed cargo was put aboard, the vessel thereupon became obligated to carry whatever additional amount it could have safely carried; that the taking of part of the amount agreed to be carried made

the vessel liable for failure to carry the remaining amount. This holding, as we shall later see, brushes aside and ignores the fundamental principle repeatedly laid down by this court, that the rights of the cargo against the ship and of the ship against the cargo are *mutual and reciprocal*. The same reasons given by the courts for not charging the vessel with liability for a total failure to carry apply with equal force to a case where the vessel takes a portion only of the goods agreed by her owner to be carried and refuses to take possession of, or carry the remainder.

As the modern rules on the point of the nonliability of a vessel for the breach of an executory contract of affreightment are based upon the holdings of this court in the cases of *The Freeman vs. Buckingham*, 18 How. (U. S.) 182, 188; 15 Law Ed. (U. S.) 341, 344, decided January 15, 1856, and *The Yankee Blade*, 19 How. 82, 15 Law Ed. (U. S.) 554, decided January 8, 1857, nothing but confusion and error can result from recourse to any decisions of the lower federal courts rendered before those dates or to any such decisions rendered since then which are based upon such earlier authorities. Prior to these two decisions there was a conflict of authority as to whether the mere execution by a vessel-owner of a contract agreeing to carry certain goods on his vessel was, without more, sufficient to subject the vessel to liability *in rem* in case of the failure of the owner to perform.

In the case of

Freeman vs. Buckingham, 18 How. (U. S.)

182, 188; 15 Law Ed. (U. S.), 341, 344.

it was sought to hold a vessel liable on a bill of lading for the failure to carry goods never placed on board or in the possession of her master. This court, holding that the vessel was not liable, said:

"Under the maritime law of the United States, the vessel is bound to the cargo, and the cargo to the vessel, for the performance of the contract of affreightment; but the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made *and a cargo shipped under it.*"

The next case was the celebrated one of

The Yankee Blade, 19 How. 82; 15 Law Ed.

554,

which was decided January 8, 1857. In this case there was a contract between the owners of certain steamboats, of which the *Yankee Blade* was one, to carry freight and passengers between New York and California. The owner of the *Yankee Blade* refused so to employ his vessel. Thereupon the owner of the other vessel brought a libel *in rem* against the *Yankee Blade*.

The court, assuming in its discussion that the instrument in question was a charter-party, says (Italics ours):

"This sort of proceeding against personal property is unknown to the common law, and is peculiar

to the process of courts of admiralty. * * * But this privilege or lien, though adhering to the vessel, is a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is therefore *stricti juris, and cannot be extended by construction, analogy, or inference.* * * *

“Now, it is a doctrine *not* to be found in any treatise on maritime law, that every contract by the owner or master of a vessel, for the future employment of it, hypothecates the vessel for its performance. * * * *The obligation is mutual and reciprocal.* The merchandise is bound or hypothecated to the vessel for freight and charges (unless released by the covenants of the charter-party), and the vessel to the cargo. * * * Where there is a charter-party, its covenants will define the duties imposed on the ship. Hence it is said that ‘the ship, with her tackle, the freight and the cargo, are respectively bound by the covenants of the charter-party.’ *But this duty of the vessel, to the performance of which the law binds her by hypothecation, is to deliver the cargo at the time and place stipulated in the bill of lading or charter-party, without injury or deterioration. If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the non-delivery, in good order, of goods never received on board.* Consequently, if the master or owner refuses to perform his contract, or for any other reason the ship does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or

maritime lien on the ship for such breach of the contract by the owners, but must resort to his personal action for damages, as in other cases."

Following this was the case of

Buckley vs. Naumkeag Steam Cotton Co., 24
How. 386; 16 Law Ed. 599,

which was decided Dec. 31, 1860. Mr. Justice Nelson, who wrote the opinion, in his discussion of this question brings out and emphasizes the rule of reciprocal rights between vessel and cargo. There the libel was against the barque *Edwin* for damages for failure to carry safely 100 bales of cotton which its master had agreed to carry. On account of the condition of that part of the Bay of Mobile from which the cargo of cotton was to be taken, it was necessary for the master of the barque to employ a lighter to transport the bales from the wharf to the barque, which was anchored out in the bay. After the lighter had reached the side of the barque and before any of the bales were unloaded, the boiler in the lighter exploded, in consequence of which the 100 bales were thrown into the water and the lighter sunk. It was held that the delivery of the bales aboard the lighter and into the custody of the master of the barque was *a delivery to the barque* and that "the lighter was simply a substitute for the barque" for the portion of the voyage between the wharf and the barque. In the course of his opinion, Justice Nelson said (*Italics ours*):

"In the present case, the cargo was delivered in pursuance of the contract, *the goods in the custody*

of the master, and subject to his lien for freight, as effectually as if they had been upon the deck of the ship, the contract confessedly binding both the owner and the shipper; and unless it be held that the latter is entitled to his lien upon the vessel also, he is deprived of one of the privileges of the contract when, at the same time, the owner is in the full enjoyment of all those belonging to his side of it."

The court, holding that there was no necessity of a physical connection between the cargo and the ship as a foundation for a right *in rem*, says:

*"The unloading of the vessel at the port of discharge, upon the wharf or even the deposit of the goods in a warehouse, does not discharge the lien; * * * and we do not see why the lien may not attach, when the cargo is delivered to the master for shipment before it reaches the hold of the vessel, as consistently and with as much reason as the continuance of it after separation from the vessel, and placed upon the wharf or within the warehouse. In both instances the cargo is in the custody of the master and in the act of conveyance in the execution of the contract of affreightment."*

After this came the case of

King vs. The Lady Franklin, 8 Wall. 325;
19 Law Ed. 455,

decided December 13, 1869. There the libel alleged that the libelants caused to be delivered at Milwaukee to the steamer *Lady Franklin* 340 barrels of flour for which they received bill of lading, but that 290 of the 340 barrels were never delivered

and, as a consequence of this state of things, they claimed a maritime lien on the *Lady Franklin* for the value of the flour. It appears that none of the 340 barrels of flour was ever delivered to the *Lady Franklin* or in the possession of her master. This court in the course of its discussion says:

"The doctrine that the obligation between the ship and the cargo is *mutual and reciprocal*, and does not attach until the *cargo is on board, or in the custody of the master*, has been so often discussed and so long settled that it would be useless labor to restate it, or *the principles which lie at its foundation*. The case of *The Freeman vs. Buckingham*, decided by this court, 18 How. 192, is decisive of this case. It is true the bill of lading there was obtained fraudulently, while here it was given by mistake, but the principle is the same, and the court held in that case that there could be no lien, notwithstanding the bill of lading. The court says 'there was no cargo to which the ship could be bound, and there was no contract for the performance of which the ship could stand as security.' "

The next case was that of

Keokuk vs. Robson, 9 Wall. 517; 19 Law Ed. 744,

decided April 11, 1870. There the libel was against the vessel to recover damages for failure to deliver a cargo of wheat according to contract. The answer denied there was any contract of affreightment binding the vessel or subjecting it to a maritime lien. This court, in rendering its decision, says:

"It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master; but the law creates no lien on a vessel as a security for the performance of a contract to transport a cargo until some lawful contract of affreightment is made, and the cargo to which it relates has been delivered to the custody of the master or some one authorized to receive it. *The Freeman vs. Buckingham*, 18 How. 188."

Moreover, the holding of the courts below in the case at bar is in direct conflict with the principles laid down in the case of

The Thomas P. Sheldon, 113 Fed. 779, in which this identical question of "part performance" was thoroughly and learnedly discussed by Judge Brown. In that case, there were libels *in rem* for breach of a contract of charter-party providing for the carriage of five cargoes of coal from one port to another by two barges, the "Thomas P. Sheldon" and the "S. L. Watson."

In the course of his opinion in that case Judge Brown said:

"In part execution of this contract, *one cargo was carried by the Sheldon, and freight was paid.* The libellant seeks damages for failure of the barges to carry the remaining four cargoes."

At the top of page 780, he says:

"I find, as a fact, that but one cargo was delivered, 1,037 tons by the Sheldon."

Also at the bottom of page 781:

"The libel against the Sheldon is solely *in rem*. She carried one cargo under the contract; but no other cargo was set apart for her by the charterer, or delivered to her, or came under the control of the master."

And further on page 782:

"According to the weight of authority, a vessel is not liable *in rem* for the breach of a contract of charter-party wholly executory. * * * *The libellant contends, however, that, if any cargo has been taken under the contract of affreightment, the right in rem attaches for full performance.* If there is, in this case, a lien *in rem*, it is difficult to see upon what principle we are to base it. The lien does not arise from the contract itself, *but is created by the law upon a delivery of a cargo to the vessel or to the control of the master.*"

After citing the cases above cited from this court, Judge Brown says on page 783:

"It seems very clear from these authorities that the contract itself creates no lien, and that the lien which is created by the law is *mutual and reciprocal*. The parties to this contract undoubtedly had mutual and reciprocal rights of lien during the carriage of the first cargo, but the lien of the ship on cargo was discharged by the payment of freight and by delivery to the consignee."

"*The contention that the lien in rem now exists can not be based upon the principle that the ship is pledged to the cargo and the cargo to the ship; and*

if there is a lien, it is unilateral, and not mutual or reciprocal."

"The lien of the cargo owner upon the ship must, therefore, be limited by the corresponding and reciprocal rights of the shipowner upon the cargo."

"The libelant contends that the courts have held that, where any cargo has been taken under the contract of affreightment, the right *in rem* attaches for the full performance of the contract, 'thereby brushing aside the theory of reciprocal rights only, and admitting a full right *in rem* wherever the contract has become in any part executed.' This is practically a concession that *unless* the theory of reciprocal rights can be brushed aside, and unless we are to treat these repeated expressions of the Supreme Court as mere *dicta*, we must deny the libelant's right to proceed *in rem*. The libelant has presented no authority which states any principle *upon which a part performance which does not create a mutual and reciprocal lien can create a unilateral lien. Part performance gives no further validity to the contract, since the contract is valid irrespective of performance.*"

"While it may be considered a hardship that the charterer should have no remedy against the vessel for an abandonment after she had entered upon a contract contemplating numerous voyages, the hardship is no greater than where, after making the contract, she has failed to perform any part of it; and though there may be *dicta* to the effect that, if a ship enters upon performance, it becomes pledged to

the complete execution of the contract, no argument has been advanced nor case presented which sets forth any *satisfactory reason* why we should not apply in this case the principles reiterated by the Supreme Court that the *maritime lien between cargo-owner and ship-owner in respect to the carriage of cargoes is a mutual and reciprocal lien, not arising from the contract itself, but created by the law upon the delivery of the cargo to the vessel or to the control of the master.*"

This decision was affirmed in the case of the same title reported in 118 Fed. 945, but the appellate court gives particular consideration to the fact that two vessels were concerned. However, Judge Putnam, speaking for the Circuit Court of Appeals, lays down these fundamental principles:

"The rule of admiralty, as always stated, is that the cargo is bound to the ship and the ship to the cargo. Whatever cases may have been decided otherwise, disregarded the universal fact that no lien arises in admiralty except in connection with some visible occurrence relating to the vessel or cargo or to a person injured. This is necessary in order that innocent parties dealing with vessels may not be the losers by secret liens, the existence of which they have no possibility of detecting by any relation to any visible fact. It is in harmony with this rule that no lien lies in favor of a vessel against her cargo for dead freight, or against a vessel for supplies contracted for, but not actually put

aboard." (Many cases cited laying down the general rules.)

And the Circuit Court of Appeals for the Ninth Circuit in the case of

Guffey vs. Alaska & Pacific S. S. Co., 130
Fed. 271,

has quoted and expressly approved the doctrine of this court as to the necessity of the delivery of the goods to the possession of the ship in order to create a claim against the ship.

In the case of

The Saturnus, 250 Fed. 407,
which was decided April 10, 1918, by the United States Circuit Court of Appeals for the Second Circuit, there is a learned discussion of a point akin to that involved in this case. This discussion illuminates, to no inconsiderable extent, the question now before the court. In that case, the libelant had an agreement with certain persons for the sale of goods f. o. b. vessels New York. The agreement provided that the government of Holland should tender steamers to libelant to load the cargoes according to a certain charter party form, according to which form it was the duty of the steamer tender to proceed to any proper berth designated by libelant. Thereafter the agents of the *Saturnus* advised libelant that the steamship was tendered for cargo under the terms of the agreement. Whereupon libelant designated a certain berth for loading, but the steamer refused to go there. Libelant then, under protest, lightered the cargo to the steamer, upon

which it was laden and carried to destination. It claimed a lien against the vessel for the damages on account of this extra expense. The judge of the District Court held (242 Fed. 174) :

"That the general maritime law does not give a lien on a vessel for the alleged breach of contract by failing to proceed to the designated berth for loading and that this general proposition is *not different in the event that the cargo is later loaded on the vessel as in the case at bar*. It is undoubtedly the law that no right *in rem* exists where the contract remains wholly executory (citing cases). I am unable to say that the later loading of the cargo affects the rights of the parties or the remedies between them as those rights or remedies existed at the time of the breach complained of."

This holding was sustained by the Circuit Court of Appeals.

Throughout this case libellant contended that since a lien did exist for a breach of an executed contract of affreightment, and this particular contract had been executed, the time of the breach complained of with respect to the time of loading was immaterial; but both courts held that, for the breach which occurred prior to the loading there could be no claim against the vessel, notwithstanding the fact that the goods were finally taken aboard and carried to destination.

In the course of his discussion, Judge Hough, who wrote the opinion of the appellate court, says:

"To make a lien depend on its relation to a point

of time, i. e., the date of delivery to the ship, is perhaps fictional or mechanical rather than thoughtful, yet, for lack of a better line of demarcation, has long been well known in matters of statutory liens of mechanics and others.

"In *The Ask* (D. C.), 196 Fed. 165, the ship's alleged wrongful delay caused waiting cargo to spoil and, after lading, a lien was asserted for antecedent damages. The delay was adjudged excusable; but McPherson, J., pointed out that any lien came into existence 'at the time injury was done,' the necessary inference being that, as nothing was laden at date of injury, there was nothing to which the lien could then attach; and there certainly can not be a lien *in nubibus*, waiting to descend."

The court then cites the following cases in support of the principles stated:

Guffey vs. Alaska, etc., Co., 130 Fed. 271, *supra*;

The Priscilla, 114 Fed. 836, where a passenger, before embarking, delivered his baggage to a representative of the company, but not to the ship or her master, and it was held that the vessel was not liable therefor;

The S. L. Watson, 118 Fed. 952, where it was held that no maritime lien could arise "except in connection with some visible occurrence relating to vessel or cargo."

Judge Hough further says:

"This litigation exemplifies a common tendency to regard any floating property used in the performance of contract as in some sort a pledge or surety

for satisfactory performance; such security to be enforced by asserted maritime lien. No such principle is known to the admiralty. *The ancient and customary lien of the sea is not maintained, nor was it created* (so far as history reveals its origin) *for the convenience or assurance of parties, but for the encouragement of commerce and shipping as a presumed benefit to the public*, in respect of an occupation hazardous and uncertain beyond most land ventures.

“In respect of carriage of goods in particular, every public benefit has for centuries been deemed obtained when goods were liable for freight, and ship for safe and sound delivery of goods, *the mutuality of relation thus growing out of the act of transport, not the making of a contract for transportation*. Anything more than this multiplies secret liens and hampers instead of advances ease and freedom of commerce. Merchant and mariner alike subject their property to the municipal law of every country into which their venture comes, but *a maritime lien is as near an approach to jus gentium as can be found in private jurisprudence, and any extension thereof not internationally well founded is to be opposed as jealously as is a denial of its accepted extent.*” (250 Fed. 412-414).

In the case of

The Hiram, 101 Fed. 138,

decided April 21, 1900, the suit was *in rem* against the vessel. The goods were actually placed aboard the vessel, but it was claimed that the vessel was

guilty of unreasonable delay in taking the goods aboard for purposes of transportation, as well as in transporting them to their destination. With reference to the delay prior to delivery, the court says:

"These delays were during the time the cargo was not in the possession of the vessel, nor had it been delivered to it or to its owners or agents. * * * The owner of a cargo has no lien upon the vessel for the breach of a contract of affreightment until the cargo, or some portion, has been laden on board or delivered to the master. (*The George Dumois*, 88 Fed. 543).

"I find the preponderance of authorities to be that *any duty that may be violated by the owner or master before the cargo is put aboard the vessel is not a duty of the vessel*, or one for the breach of which a lien on the vessel is created or can be enforced. * * * The ship, however, would be answerable for any negligence that caused damage to the cargo after its shipment on board. * * * I am clearly of the opinion that the vessel is not liable for any loss or damage that was caused by the delays complained of as occurring prior to the delivery of the cargo to the vessel."

To the same effect:

Elvers vs. Grace & Co., 244 Fed. 705.

The case of

Scott vs. Ira A. Chaffee, 2 Fed. 401,

is cited in the opinions of the lower courts in support of libellant's claim of lien herein, but is, we contend, a decisive authority to the contrary. We

shall deal with this case on subsequent pages of this brief, where we shall also consider all the other cases cited in support of the courts' decisions on this point.

In the case of

The Vigilancia, 58 Fed. 698,
libelants' claim was for supplies (oleomargarine) supplied to the vessel belonging to New York owners. At that time there was no statute in New York giving a lien on domestic vessels for supplies or necessities. Libelants, therefore, sought to show that the goods were delivered in New Jersey and thus to establish a lien under the general maritime law as against a foreign vessel.

The court, in the course of his opinion, said:

"If * * * the delivery to the truckmen (of the ship-owners) was in law a delivery to that company (this delivery being made in Jersey City), still that *would not amount to a delivery or to a furnishing of supplies to the ship in Jersey City, but only to a common law delivery to the company, sufficient to bind the company in personam*, which is a very different thing from a delivery to the ship, or binding the ship *in rem*. The ship was not in Jersey City, but within a different jurisdiction, a mile or two away. *There can be no delivery to the ship in the maritime sense, whether of supplies or of cargo, so as to bind the ship in rem, until the goods are either actually put on board the ship or else brought within the immediate presence or control of the officers of the ship.*"

Decided November 2, 1893, S. D. New York,
Brown, D. J.

See also:

The Caroline Miller, 53 Fed. 136.

The Guiding Star, 53 Fed. 943; 62 Fed. 407,
416.

Notwithstanding the repeated insistence of this and the lower federal courts upon the necessity of mutual and reciprocal rights of lien as between ship and cargo, the learned judge of the trial court, in his opinion overruling claimant's exceptions to the libel, while he concedes that *The Freeman* and *The Yankee Blade* settle the proposition that a libel *in rem* will not lie for the breach of an executory contract of affreightment "while the same remains wholly unperformed," makes no mention of the *principle of mutuality and reciprocity* which this court lays down as the very foundation of the merely resulting rule which His Honor states and accepts; nor does the Circuit Court of Appeals in its opinion make any mention of this principle except to emasculate it with qualifications and exceptions (R. 1048).

His Honor of the District Court, after referring to *The Freeman* and *The Yankee Blade*, says (Italics ours):

"Since the decision of those cases, however, the courts have, with rare exceptions, enforced liability *in rem* where there has been performance in part by the ship, *such as in the present case*, in taking and receiving on board part of the cargo engaged to be

carried, or in doing any other act evidentiary of the fact of entering upon the discharge of the contractual engagement. The subject has received such lucid and persuasive consideration at the hands of Brown, district judge, afterward a justice of the Supreme Court, as practically to set it at rest. *Scott vs. The Ira Chaffee*, 2 Fed. 401. The facts of this case were such as to show a non-performance in any particular, and the libel was dismissed.

"But the subject in hand was fully treated of, and many cases since then, and some even previously, have sustained the libel where it was made to appear that the ship had entered in some way upon the discharge of its engagement to carry. See

The Hermitage, 12 Fed. Cas. 6410.

The Williams, 29 Fed. Cas. 17710.

The Director, 26 Fed. 708.

The Starlight, 42 Fed. 167.

The Oscoda, 66 Fed. 347.

The Helios, 108 Fed. 279.

The Oceano, 148 Fed. 131.

Wilson vs. Peninsula Bark & Lumber Co.,
188 Fed 52." (R. 25-26.)

The above holding and ruling was adhered to by the court throughout the case, i. e., in the order overruling claimant's exceptions to the amended libel (R. 52), in overruling claimant's objections to the introduction by libelant of any testimony (R. 67) and in the opinion on the merits (R. 912).

The Circuit Court of Appeals sustained this rul-

ing and approved the authorities cited as supporting it.

We respectfully submit that not one of the foregoing authorities sustains the holding that "since the decision of those cases" (i. e., *The Freeman* and *The Yankee Blade*), "the courts have, with rare exceptions, enforced liability *in rem* where there has been performance in part by the ship, *such as in the present case.*" (Italics ours).

In this list there is no case involving the question now before the court, none in which it has been held that, in case of a contract to transport a certain cargo—much less an unidentified, and unidentifiable cargo—the taking by the ship of a part of it made the ship liable *in rem* for refusing to take the remainder.

We shall briefly notice these cases.

In the cited case of

Scott vs. Ira A. Chaffee, 2 Fed. 401, we find language quite similar to that used by the lower court, but not with any such qualification as is expressed by the words, "*such as in the present case.*" In the first place, the question now being considered was not there involved. The libel was upon a contract to carry a boiler. The boiler was never put aboard or in the custody of the master and, for this reason and this reason alone, the court held that libellant did *not* have a lien against the vessel and dismissed the libel. This decision, *as a decision*, certainly can not be construed as authority *in favor* of libellant's claim herein of a lien

against the "Saigon Maru." However, Judge Brown, who wrote the opinion in that case, did, in the course of a learned discussion, give expression to the following general language:

"Whatever be the rule with regard to contracts of affreightment which are purely executory, it must now be considered as settled that, if the ship enters upon the performance of its work or any step has been taken toward such performance, the ship becomes pledged to the complete execution of the contract and may be proceeded against *in rem* for a non-performance." (2 Fed. 401).

Apparently, it is upon this deliverance mainly that the District Court at least bases its decision. But we have no quarrel with this dictum, provided it be read in the light of the decisions of this court and of what is said by Judge Brown himself on pages 407-408 of the same opinion. In that opinion Judge Brown, as if to guard against the construction put by the lower courts upon his language, says:

"If the owner of a cargo has a privilege upon the vessel for a breach of his contract, the vessel would be entitled equally to a lien on the cargo for a refusal of the owner to put it on board, and it might be seized upon the dock or anywhere else for the satisfaction of such lien. If the jurisdiction is sustained in this class of cases, it ought also to include cases of contract to repair the vessel or supply her with stores, in which the material-man would be

entitled to a lien, though nothing had been done under the contract."

"The continental authorities are explicit to the effect that there is no privilege upon the ship until the goods are laden on board. Indeed, they seem to go further, and hold that even after they are shipped they may be withdrawn by the freighter at any time before the vessel breaks ground."

It is to be supposed that Judge Brown, in using the language first above quoted with reference to part performance, had in mind the usual and familiar cases of part performance of contracts of affreightment, i. e., cases where the ship had "entered upon the performance of its work" as to *all the goods in question*, as where, preparatory to their carriage, they had been placed in the possession of the master of the vessel or on one of her lighters or aboard the vessel herself, and these steps had been followed by her refusal to proceed any further with the carriage.

Even if Judge Brown's language on this point be taken in the sense apparently adopted by the lower courts it is, at most, merely *dicta* and, as such, should certainly not be allowed to outweigh the pronouncements of this court in *The Yankee Blade* and other cases above cited, in which this Honorable Court has repeatedly declared that the right of the vessel owner to a lien against the cargo and of the cargo owner to a lien against the vessel are mutual and reciprocal.

It is true Judge Brown cites the case of

The Williams, 29 Fed. Cases 17,710, where a tug was hired to go to the assistance of a vessel in distress and, on arriving at the spot, found that the vessel had been gotten off, and says he had "no doubt as to the correctness of this ruling." But this was a contract for a salvage service and not a contract of affreightment. We submit that, in the discussion of the question of the mutual rights of cargo and ship, no reliable results can be reached by embarking on the sea of the law of salvage and that in the discussion of the present question analogies are unsafe guides.

The Yankee Blade, 19 How. 82; 15 Law Ed. (U. S.) 554.

The case of *The Williams* is one of the cases cited by the courts below in support of their holding on this point. (R. 25, at bottom). In that case, Judge Emmons, who wrote the opinion, expressly repudiated the doctrine of *Freeman vs. Buckingham* and *The Yankee Blade*, saying that the *dicta* of those cases have been "expressly overruled," and placed his decision squarely on the ground that the mere making of the contract, without more, made the vessel liable *in rem* in case of failure to perform, and stated that it had theretofore ruled that "all maritime contracts made within the scope of the master's usual authority did *per se* hypothecate the ship, and adds: "We see no reason to modify this ruling, but hold that the contract in this case did, *ex vigore*, the instant it was consummated, pledge

both vessels, that which was to aid and that to be aided, for the security of the claim."

In making the foregoing holding, Judge Emmons followed the authority of *The Flash*, Fed. Case No. 4857, which the Circuit Court of Appeals for the Ninth Circuit itself held, in the case of *Guffey vs. Alaska, etc., Co.*, 130 Fed. 277, "must be deemed overruled by subsequent decisions."

But, on the point of part performance now being considered, *The Williams* not only fails to sustain the holding of the lower courts in support of which it is cited, but *holds exactly to the contrary*, as follows:

"Performance in whole or in part works no consequence in reference to jurisdiction generally or in the character of the remedy, whether in rem or in personam. It affects only the measure of the recovery."

In the case of

The Hermitage, 12 Fed. Cases, 6410, cited in the opinions of both the District Court and the Circuit Court of Appeals, the libel was by the shipowner against the cargo. *There all of the goods libeled had been actually placed aboard the vessel preparatory to the voyage and afterward taken off by the charterer.* This was clearly sufficient even under the rule for which we are here contending to give the vessel a lien upon the goods and the goods a lien upon the vessel. The "part performance" of the carriage in the cited case was a part perform-

ance as to the goods laden and as to none other. The court says:

"Here the voyage had commenced, and upon the very terms of the agreement between the parties. The goods were put on board the vessel, and if the lien attach at all, it attached *as soon as they were laden aboard*. So far as the form of the remedy is concerned, it is the same as if the voyage had been broken up by the charterers at any other point in the course of the voyage, after the vessel had been out a week or a month or longer."

In the cited case of

The Director, 26 Fed. 708,

the libel was by the shipper against the vessel. Here also the *cargo in question had all been put aboard the vessel* and afterward taken off. No part of the claim was for failure to carry any goods not placed aboard.

In the case of

The Starlight, 42 Fed. 167,

the question as to whether there was a right to proceed *in rem* is not mentioned in the opinion. The point does not appear to have been raised.

In the case of

The Oscoda, 66 Fed. 347,

there was a towage contract and the tug *actually towed the vessel a part of the distance* and then abandoned her. This would be quite similar to the case of a ship that, after having taken cargo on board and proceeded half way on her voyage, had landed it at an intermediate point or thrown it

overboard. Moreover, it is unsafe to reason by analogy from the law of towage to the law governing the carriage of goods in a ship. Each of these branches of the law has its own peculiar rules. As was said by the Circuit Court of Appeals for the Ninth Circuit in the case of *Guffey vs. Alaska & P. S. S. Co.*, *supra*, upon the authority of the *Yankee Blade*, *supra*, "the lien imposed on a vessel by a contract of affreightment and delivery of the goods to the vessel is *stricti juris* and can not be extended by *analogy* or by inference."

In the case of

The Helios, 108 Fed. 279,

no contract of affreightment was involved.

In the case of

The Oceano, 148 Fed. 131,

the suit was not for failure to carry cargo, but *for money had and received*, which had been paid under an erroneous settlement. Besides, in that case, *all* of the cargo in question was not only laden, but also carried to destination.

The Circuit Court of Appeals, in sustaining libellant's claim to a general admiralty lien, reviews at length and lays great stress upon the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of

Wilson vs. Peninsula Bark & Lumber Co.,
188 Fed. 52,

in which, it is well to note, the opinion contains no reference to any such question.

With reference to the applicability of this case

to the question now being considered, the court said:

"The contention of the appellants that the cases so cited are not here applicable we think not well founded. On the contrary, the last case there cited, *Wilson vs. Peninsula Bark & Lumber Co.*, 188 Fed. 52, which is a decision by the Court of Appeals of the Sixth Circuit, while based upon a *state statute*—as appears from the record of that case not, however, called to our attention until the petition for rehearing in the present case was filed—is, it seems to us, strikingly in point upon the question urged by the appellants that the 308,441 feet of lumber *had not been sawed prevented the lien claimed by the appellee from attaching to the ship.*"

Although this excerpt from the court's opinion may itself be sufficient to show that the case therein cited is not in point, we are, nevertheless, taking the liberty of depositing with the clerk of this court the printed record and briefs of counsel used upon the appeal of that case, for convenience of reference in case Your Honors should desire to examine them. They show the following facts:

The claim of lien in that case was based upon a statute of the State of Michigan; the vessel therein involved was a vessel of the State of Michigan; and the voyage there in question was a voyage from one port in the State of Michigan to another port in the same state. The question of a lien under the general admiralty law was not there involved. No question of any right of lien was raised in the briefs of

counsel, nor was any such question discussed in the opinion of the District Judge.

Neither the opinion of the District Court nor of the Circuit Court of Appeals in that case discusses any question of the necessity of the delivery to the vessel of the agreed cargo or of the fact, if it was a fact, that the lumber in question had not been sawed.

The statute of the State of Michigan, upon which the lien in the *Wilson* case was based is as follows:

"Every water craft of above five tons burthen used, or intended to be used in navigating the waters of this state, shall be subject to a lien thereon,

First—For all debts," etc.

Second—For all sums due for wharfage," etc.

Third—For all sums due for bottomry," etc.

Fourth—For all damages arising from the non-performance of any contract of affreightment, or of any contract touching the transportation of persons or property, entered into by the master, owner, agent, or consignee of such water craft, where any such contract is to be or shall have been performed, in whole or in part, within this state."

Fifth—For all damages arising from injuries done to persons or property by such water craft," etc.

Mich. C. L. 1897, Sec. 10787, Sub 4.

Howell's Michigan Statutes (Annotated Second Edition) 1913, Sec. 13625.

Upon the principles laid down in the cases here-

inbefore cited by your petitioners against the existence in this case of a lien upon the "Saigon Maru," we contend that no legal relation whatever exists between any particular lot of goods and any particular ship until the goods are placed in the possession of the ship, but that the moment the goods are placed in the ship's possession they become "cargo" and bound to the ship for the agreed freight thereon, and the ship becomes bound to them for their safe carriage to destination.

When the 2,678,410 feet of lumber which was actually carried was put aboard the "Saigon Maru," and *as it was put aboard*, this particular lumber and none other became bound to the ship and the ship became bound to this particular lumber and to none other. This pledge of the cargo to the ship, giving the ship the right to hold the cargo until the freight thereon is paid, and this hypothecation of the ship to the cargo to carry it safely to destination, are implied liens arising from the fact of loading and at the moment of loading and have their origin in the twilight of maritime history. Applying to this case the principle that the rights of cargo against ship and of ship against cargo shall be reciprocal, and assuming that the additional 308,441 feet which the courts below held the vessel should have carried on deck had been actually in being and piled upon the wharf of the mill where it was sawed, and further, that libelant had refused to deliver it to the ship, would this 308,441 feet of lumber have been "bound to the ship" in the sense of the maritime

law, or in any sense? Could claimant have seized it or maintained a lien against it for dead freight—for the contract value of the space contracted for, but not used by libellant? Would there be in any such case any legal relation whatsoever between that lot of lumber and that ship? To the judicial mind, the mere statement of any such proposition is its own refutation.

But there was, in fact, as the courts below found, no quantity of 308,411 feet or any other quantity of actual lumber at the Inman-Poulsen mill or elsewhere.

If the relative positions of the parties had been the reverse of what it was—the captain demanding 308,441 feet more lumber and libellant refusing compliance with the demand—and claimant had sued *in rem* to enforce the lien which it must have under the doctrine of reciprocal rights, what *res* could the marshal have found to arrest?

As bearing directly upon this point, we can find no language more apt than that in the case of

Scott vs. The Ira Chaffee, 2 Fed 407, cited by both the trial and appellate courts against our contention:

"If the owner of a cargo has a privilege upon a vessel for a breach of his contract, the vessel would be entitled equally to a lien on the cargo for a refusal of the owner to put it on board, and it might be seized upon the dock or anywhere else for the satisfaction of such a lien."

The Circuit Court of Appeals assumes as a basis for its reasoning that,

"Originally ships were held liable *in rem* under contracts of affreightment which were purely executory, but that rule was at an early date so modified in this country as to hold them so bound only after actually entering upon the performance of the contract."

The first case cited in support of this premise is the *Ira Chaffee*, 2 Fed. 401. In that case Judge Brown says:

"Prior to the decisions of the supreme court in the case of *The Freeman*, 18 Howard 182, and *The Yankee Blade*, 19 Howard 82, the question of jurisdiction in cases of executory agreements was *unsettled*." * * * "The question does *not* seem to have been *settled* in England."

And in the same opinion Judge Brown further states:

"The continental authorities are explicit to the effect that *there is no privilege upon the ship until the goods are laden on board*. Indeed, they seem to go further, and hold that even after they are shipped they may be withdrawn by the freighter at any time before the vessel breaks ground."

This court, in the case of

The Yankee Blade, 19 Howard 82-92; 15 L.

Ed. (U. S.) 554, 556,

cites continental authorities as the basis for the rule there declared, saying, among other things:

"This lien or privilege is founded upon the maritime law as stated by Cleirac,

'Le batel est obligé e a la marchandise et la marchandise au batel.'

The obligation is mutual and reciprocal."

Reliance is also placed on other continental authorities cited in the opinion.

Cleirac states the rule to be that,

"The mutual obligations of the personified ship and the personified cargo begin when they are in charge of the same master, i. e., the captain, and covers only what occurs during the period of union."

We submit, therefore, that the premise assumed by the court that "originally ships were held liable *in rem* under contracts of affreightment which were purely executory" is not well founded.

The Circuit Court of Appeals, in its opinion, also states:

"True it is that the lien of the ship on the cargo for freight and expenses in connection with its carriage and the lien of the cargo on the ship for safe carriage and delivery are *very generally* reciprocal, but in the nature of things such reciprocity does not and cannot exist in every case. This illustration of that fact is given by the appellee: 'All agreements for the carriage of persons or property by vessels are contracts of affreightment' (Benedict 4 Ed. sec. 199, 201), yet when a passenger takes passage on a vessel and the vessel receives him on board and commences the voyage, but fails to complete it, she is liable *in rem* for her failure. Ob-

viously in such case such reciprocity does not exist, for there can be no lien on the passenger."

As to the illustration of the case of a passenger given apparently as an exception to the general rule and as justifying the use of the qualifying expression, "*very generally*," we submit most respectfully that the "exception" is not germane to the rule. The rule covers the relation of cargo and vessel; the exception, that of passenger and vessel. The rule stated by this court and by the continental authorities has reference solely to the carriage of *goods*—to the relation between the inanimate merchandise laden and the inanimate ship on which it is laden, and, as applied to the carriage of goods, the rule is susceptible of application without qualification or exception. The fact that the same rule cannot be applied to passengers is wholly beside the question. The matter of the legal relation of vessel and passenger lies in another field of the law and is governed by its own peculiar rules.

This court has repeatedly declared the rule for which we are here contending and has declared it without qualification or exception. We submit, therefore, that it should not be ignored or varied upon the authority of decision of inferior courts in cases where the question in controversy was not involved, nor destroyed by the application to it of "exceptions" not germane to its subject-matter.

The doctrine of part performance as applied by the courts below leads to uncertainty and confusion.

The courts below held that the taking on board

by a vessel of any part of a quantity of goods agreed by the vessel-owner to be carried thereon obligated the vessel to carry the rest of it, *on the ground that this act of the vessel constituted a part performance of the affreightment contract*. If part performance has such potency in binding the vessel—if there be nothing in contention that the lien of the vessel upon the goods to be carried and that of goods upon the vessel which is to carry them shall be mutual and reciprocal—then the “Saigon Maru” was bound long before the first plank of her proposed cargo was placed in her hold; for, we submit, there was a part performance of the contract when the vessel took on coal at Tacoma for the contemplated voyage; when, after leaving Tacoma and traversing the waters of Puget Sound and of the Straits of Juan de Fuca, she turned her prow southward for Portland; when she crossed the Columbia River bar; when she entered the Willamette River; when she moored alongside the wharf of the Inman-Poulsen Lumber Company at Portland; when she got her winches, booms and falls ready to take on the first sling-load of lumber. In fact, if the doctrine of part performance, as applied by the courts below, is permitted to stand and the liens of cargo against ship and of ship against cargo held not to be necessarily mutual and reciprocal, there will be no certain or definite rule by which it can be determined in any given case whether or not a right of lien exists, and, moreover, vessels will be made subject to secret maritime liens based

upon occurrences not appearing to have any connection therewith.

NO LIEN UNDER OREGON LAW.

But libelant contended in the courts below that, even if it had no lien under the general admiralty law for the breach of an executory contract of affreightment, it had such a lien under the statute law of the State of Oregon. Consequently, if this court should hold that libelant had no lien under the general admiralty law, it would become necessary to consider its claim to a lien under the Oregon statute.

Inasmuch as both the trial and appellate courts held that libelant was entitled to a lien under the *general admiralty law*, neither found it necessary to consider the question as to whether it had a state statutory lien and, consequently, we are not favored with the opinions and have no intimation of the views of either court on this interesting subject. The Oregon statute upon which libelant relies is section 10281 of Olson's "Laws of Oregon," which provides as follows:

"Every boat or vessel used in navigating the waters of this state, or constructed in this state, shall be liable and subject to a lien * * *

4. For all demands or damages accruing from the non-performance or mal-performance of any contract of affreightment, or of any contract touching the transportation of persons or property, entered into by the master, owner, agent, or consignee of the boat or vessel on which such contract

is to be performed, and for damages or injuries done to persons or property, by such boat or vessel, and for damages or injuries by such boat or vessel resulting in the death of any person."

We submit that this statute does not aid libellant's case for these reasons:

1. The statute was not intended to apply to vessels other than those of the State of Oregon, while the "Saigon Maru" is a Japanese vessel.

2. If this act was intended to apply to foreign vessels, it is in conflict with the Constitution of the United States and void.

In this connection it was stipulated between the parties hereto as follows:

"STIPULATED that at the time of the execution of the charter-party and at all times since, the claimant herein, Osaka Shosen Kaisha, was and still is a corporation organized and existing under and by virtue of the laws of Japan with its principal place of business at Osaka in said country, and was during all of said times and still is the owner, in possession and engaged in the operation of said steamer "Saigon Maru," which was at all of said times and still is a Japanese vessel and not a vessel of the United States, or of the State of Oregon, or constructed in said state." (R. 652).

The "Saigon Maru" was a tramp steamer and was never before the voyage now in question on this side of the Pacific Ocean. (R. 78). Captains Yamaguchi and Yamamoto had for about five years immediately prior to the latter's visit to Portland

navigated her exclusively in Oriental waters. (R. 78, 714, 787, 799, 800).

OREGON STATUTE NOT INTENDED TO APPLY TO
FOREIGN VESSELS.

As to the first point above mentioned, the boats and vessels referred to are boats and vessels "used in navigating the waters of this state or constructed in this state," showing plainly an indication to restrict it to domestic vessels.

The Oregon case of

The Haytien Republic, 65 Fed. 120 (Ore.), is directly in point on the question as to what vessels are subject to the liens provided for in the statute of that state. Claims for repairs and supplies were asserted against the *Haytien Republic*, which was engaged exclusively in navigating the seas between ports of the State of Oregon and foreign ports. The court said:

"So far as these claims are for repairs and supplies furnished the vessel in her home port, they are not liens, unless they are within the state statute. The lien provided by such statute is restricted to boats or vessels used in navigating the waters of the state or constructed within the state. I am of the opinion that vessels used exclusively in navigating the seas between ports in this state and foreign ports are not within this statute, that they are not vessels used in navigating the waters of the state, and that no lien exists for repairs or supplies furnished such vessel in her home port."

(Decided December 17, 1894.)

The statute of Minnesota, which is identical with that of Oregon, has been held not to apply to foreign vessels or to vessels engaged in foreign commerce.

Corsica vs. Moore Co., 253 Fed. 689,
in which many cases are cited.

The Menominie, 36 Fed. 197.

The steamer *George W. Elder* was libeled to enforce a claim for dockage under the Oregon statute. It was alleged that the *Elder* was a vessel plying the waters of the United States. The court said:

"It does not specifically appear in the libel whether the port of Portland is the home port of the steamship *Elder* or whether her home port is within the state or district of Oregon, but it seems to be conceded and I am warranted therefore in treating the cause as if such were the case in fact."

The lien was sustained.

(Decided February 24, 1908.)

The George W. Elder, 159 Fed. 1005.

An act of the California legislature authorized attachments against boats and vessels "*used in navigating the waters of this state.*" Held, that a vessel belonging to the port of New York and intended for the New York and China trade which had been in the harbor of San Francisco but a few days and was never otherwise used in navigating the waters of California than by sailing into the harbor of San Francisco from the ocean, was not, within the meaning of the statute, a boat or vessel used in navigating the waters of said state.

Souter vs. The Sea Witch, 1 Cal. 162.

To the same effect are the cases of

The San Rafael, 141 Fed. 270, 280.

Steamboat Orleans vs. Phoebus, 11 Peters,
175.

In the case of

Cuddy vs. Clement, 113 Fed. 454,

the lien claimants were coal suppliers who furnished coal at Cleveland, Ohio. The vessel was foreign, although the statement to this effect is not specific. The statute upon which the lien claimants relied was that of Ohio, which was as follows:

"Any steamboat or other water craft navigating the waters within or bordering upon this state shall be liable," etc.

It seems that the court held that there was no lien under the general admiralty law and then adds:

"This leaves nothing remaining to be considered except the Ohio statute. *In The Iris*, we were careful to limit the case to the application of a state statute to a domestic vessel. Nowhere has it ever been said that a state statute is valid to alter the conditions as to maritime liens, with reference to supplies and repairs furnished vessels in foreign ports, as to which a complete set of rules has been framed by the Federal Courts." * * * * *

"With reference to this case our conclusions are practically the same as those of the Circuit Court of Appeals for the Second Circuit, in *The Electron*, 74 Fed. 689, so far as that court had under consideration the application to foreign vessels of a

state statute, attempting to give liens for repairs or supplies."

(Decided January 16, 1902, by the Circuit Court of Appeals for the First Circuit.)

Judge Story in the course of his opinion in

The Chusan, 2 Story, 455; 5 Fed. Case No. 2717,

held that a similar statute of the State of New York was not intended to apply to foreign vessels, saying:

"New York is the last state in the Union which, in point in interest, would entertain the purpose of crippling the national authority over the regulation of commerce, or of interfering with the great principles of maritime law upon liens for repairs and other kindred purposes."

The language of the New York statute referred to by Judge Story is much more general than that of the Oregon statute. It is that "whenever a debt amounting to \$50 or upwards shall be contracted by the master, owner, agent or consignee, of any ship or vessel within this state."

In the case of

The Saturnus, 242 Fed. 173, 174 at bottom, hereinbefore considered on another point, and in which a lien was asserted for damages sustained prior to loading, the court says:

"Libellant contends that it is entitled to a lien on the vessel under the New York Lien Law. * * * In the first place courts of admiralty are not inclined to recognize local statutes purporting to establish a lien where the maritime law gives none."

STATUTE UNCONSTITUTIONAL IF APPLIED TO
FOREIGN VESSELS.

The leading case on this general subject is
The Chusan, 2 Story 455, 5 Fed. Cases, No.
2717,

in which the opinion is by Judge Story.

The libel was for materials for repairs done on the *Chusan* of Marblehead, Massachusetts. The repairs were done in New York. When the vessel returned to Massachusetts it was libeled for the value of the materials. The owner of the vessel contended that the lien was lost upon the departure of the vessel from the State of New York for the reason that the statute of New York provided that the lien should cease when the ship left the state.

Judge Story held the statute inapplicable for two reasons:

1st, That it was not intended to apply to foreign vessels, making the remarks above quoted as to the purpose and policy of the State of New York.

2nd, That if intended to apply to foreign vessels, it is unconstitutional.

In the case of

The Roanoke, 189 U. S. 185, 47 Law Ed.
(U. S.) 770,

the libel was *in rem* for materials and also work and labor in the repair of the steamship *Roanoke*, furnished to certain contractors with the owners who had full charge of the operation and repair. The steamship *Roanoke* was a foreign vessel. The labor was performed and material furnished at the in-

stance of independent contractors. Under the general maritime law this gave no lien against the vessel, but libelants relied upon the statute of the State of Washington, providing that:

"All steamers, vessels, and boats, etc., are liable * * *

3. For work done or material furnished in this state, for their construction, repair, or equipment, at the request of their respective owners, * * * contractors, sub-contractors, etc."

The owner had paid the contractor. The court said:

"It is competent for the states to create liens for necessities furnished to domestic vessels, and that such liens will be enforced by the courts of admiralty under their general jurisdiction over the subject of necessities. * * * The right to extend these liens to foreign vessels in any case is open to grave doubt."

"The question involved in this case, however, is whether the states may create such liens as against foreign vessels, and under such circumstances as would not authorize a lien under the general maritime law."

The court then quotes with approval the opinion of Judge Story in the case of *The Chusan*, just above cited.

In concluding its opinion the court said:

"Bearing in mind that exclusive jurisdiction of all admiralty and maritime cases is vested by the constitution in the Federal courts, which are there-

by made judges of the scope of such jurisdiction, * * * the statute of the State of Washington, in so far as it attempts to control the administration of the maritime law by creating and superadding conditions for the benefit of a particular class of creditors, and thereby depriving the owners of vessels of defenses to which they would otherwise have been entitled, is an unlawful interference with that jurisdiction, and to that extent is unconstitutional and void."

The Roanoke was decided March 2, 1903.

Prior to the decision of the Supreme Court of the United States in the *Roanoke* case, Judge Hanford of the Western District of Washington was the only federal judge in the United States who held that it was competent for a state to create a maritime lien which was enforceable against a foreign ship.

McRae vs. Bowers Dredging Co., 86 Fed. 344,
which was decided March 31, 1898.

The Del Norte, 90 Fed. 506,
which was decided Nov. 29, 1898.

The Robert Dollar, 115 Fed. 218,
which was decided April 2, 1902.

In a foot note on page 772 of 26 Cyc., Judge Hughes, the author of the article, refers to these three decisions, and says that Judge Hanford—

"Bases his ruling upon the power of a state to legislate over persons or property within its jurisdiction, whether there permanently or temporarily. Such power of legislation is of course obvious, but it is subject to constitutional limitations. One of

those limitations is that a state cannot add to or detract from the general admiralty law, however extensive its range of legislation over ordinary common law rights and remedies. He does not refer to the *Chusan* case in any of his opinions. The question is practically settled in *The Roanoke*, 47 L. Ed. 770. In it the Supreme Court passing upon the same statute of Washington which was before Judge Hanford held that a state could not as to foreign vessels make supplies not ordered by the master a lien and thereby create conditions not recognized by the general maritime law. And it strongly intimated that such a statute could not affect a foreign vessel at all."

26 Cyc., p. 772, note 29; also 26 Cyc., 771-2.

The same author, in his well known work on Admiralty, writing two years before the decision in the *Roanoke* case, says:

"If state statutes can regulate not only claims against domestic vessels, but against foreign vessels, they can add liens to maritime causes of action that did not exist before, and take them away where they did exist. Consequently, a foreign vessel would find a different law in every port. It would certainly seem more consistent with principle to hold, as is historically true, that the sole purpose and object of these state laws were to put domestic vessels on the same footing as foreign vessels. The converse of this, that they can reduce foreign vessels to the basis of domestic vessels, would be a great anomaly. Accordingly, the best-considered

decisions have held that the maritime rights of foreign vessels are independent of these state statutes (as an attempt to regulate them would be to interfere with the general admiralty jurisdiction), and that these statutes regulate only rights against domestic vessels."

Hughes on Admiralty (2nd Ed. p. 118) Sec. 52; p. 108.

A few months after the *Roanoke* decision Judge Hanford decided the case of

The Energia, 124 Fed. 842.

He held that the Washington statute mentioned in the *Roanoke* case, in so far as it gave a lien on all vessels for the non-performance of a charter to carry cargoes to and from the ports of the state, is enforceable against both foreign and domestic vessels, or vessels engaged in either domestic, interstate or foreign commerce.

Judge Hanford took the position that it had not been decided in the *Roanoke* case that it was incompetent for the state in any case to create liens upon foreign vessels, but only that grave doubt is expressed as to whether this could be done; and Judge Hanford adds that this leaves "other courts free to decide according to their own sense of right in each particular case." He accordingly held that a state could provide for maritime liens upon a foreign vessel for failure to perform a contract of carriage.

But since the decision in the *Roanoke* case, Judge Hanford is the only federal judge who has taken

the position that that case had not settled the question as to the incompetency of a state to create a maritime lien upon a foreign vessel; and we submit that this court itself has, in the case of

Southern Pacific Co. vs. Jensen, 244 U. S. 205; 61 L. Ed. 1086. Decided May 21, 1917,

both in the majority and in the dissenting opinion, held that this question had been settled in the *Roanoke* case, saying:

"They (the said statutes) cannot authorize proceedings *in rem* according to the course in admiralty. (Citations). Nor create liens for materials used in repairing a foreign ship (citing the *Roanoke* case); and plainly we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristics features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. * * * Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state to another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. (Citations). And the same character of reasoning which supports this rule, we think,

makes imperative the stated limitation upon the power of the states to interpose where maritime matters are involved. * * * If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a materialmen's lien, condemned in *The Roanoke*."

And in his opinion, Mr. Justice Pitney says:

"*The Roanoke* * * * gave a negative answer to the very different question whether a state could, without encroaching upon the federal jurisdiction, create a lien against foreign vessels to be enforced in the courts of the United States."

As will be seen later, the inferior federal courts have taken the position that the question now being considered has been definitely settled in the *Roanoke* case.

Attention is also called, in this connection, to the case of

Union Fish Co. vs. Erickson, 248 U. S. 308;
63 Law Ed. (U. S.) 261,
decided January 7, 1919, in which it was held that

the statute of frauds of the State of California had no application to maritime contracts.

And also to the following cases:

Chelentis vs. Luckenbach S. S. Co., 247 U. S. 372; 62 Law Ed. (U. S.) 1171;

Workman vs. New York City, 179 U. S. 552; 45 Law Ed. (U. S.) 314;

The Lottawanna, 21 Wall, 558, 575, 22 Law Ed. (U. S.) 654.

In the case of

The Electron, 74 Fed. 689,

an attempt was made to maintain a lien against a foreign vessel for materials and repairs without showing that credit was given to the vessel. The said statute provided for such a lien and dispensed with the necessity of showing that such credit was given; but the court held that this statute was not applicable to foreign vessels, that in determining whether there was a lien upon a vessel resort must be had to general maritime law and the state law disregarded. Decided May 26, 1896.

In the case of

The Athinai, 230 Fed. 1017.

decided February 8, 1916, Judge Hough, of the Southern District of New York, said, with reference to a claim of lien against a foreign vessel under a state statute:

"I do not feel it obligatory or useful to discuss the nature of the services rendered or the expenses incurred, whether maritime or not, nor to ascertain whether the lien rests upon tort or contract, for it

remains true that it is beyond the power of any state to create a lien enforceable in admiralty by process *in rem* against a foreign ship."

This holding was followed in

The Natchez, 236 Fed. 588,
decided July 12, 1916.

As throwing further light upon this subject we cite:

The Prince Leopold, 9 Fed. 333.

The Monte A, 12 Fed. 331.

In the case of

The New Brunswick, 125 Fed. 567 (Mass.), the litigation was against the proceeds of the steamer *New Brunswick* of Portland, Maine. The claim was for coal and labor while she was lying at Boston, Mass. This claim was filed with the city clerk of Boston as required by the Massachusetts laws. The petition asserted two liens:

"First, a general maritime lien; and second, a statutory lien upon a foreign vessel. The libel was filed before the case of the *Roanoke*, 47 L. Ed. 770, had appeared in a bound volume of reports. *That case decided that the statutory lien does not affect foreign vessels* and so Morrison (the claimant) became limited under these pleadings to the general maritime lien."

The court held that there was no general maritime lien. Then the claimant tried to show a lien under the statute by an amendment to the effect that the principal place of business of the corporation was Boston, although it was organized under

the laws of Maine. The court held this as insufficient to show the vessel to be domestic.

"A petition cannot be sustained as for a general maritime lien, for that matter is admitted to be *res judicata*; nor as for a special lien against a Massachusetts vessel, for it contains no sufficient allegation that the vessel's home port was in this state."

(Decided October 30, 1903, by Judge Lowell in the District Court of Massachusetts.)

The above case of *New Brunswick* was appealed to the Circuit Court of Appeals for the First Circuit and there affirmed.

The Circuit Court of Appeals first quotes from the opinion of Judge Lowell as follows:

"He (the intervenor) seems to have supposed that he could avail himself of the lien given by the statutes of Massachusetts. He may have supposed this either because he thought the steamer was a Massachusetts vessel, or because he did not anticipate the decision of the Supreme Court in the *Roanoke*, 47 L. Ed. 770."

The Circuit Court of Appeals says in the course of its opinion:

"The petition contains some allegations looking to claiming the lien under the statutes of Massachusetts. The *Roanoke*, 47 L. Ed. 770, as applied to the petition and the facts already referred to, rendered ineffectual any attempt to enforce such a lien. The *Roanoke* was decided on the 2nd day of May, 1903, but the volume containing it was un-

doubtedly published after this petition was filed. The opinion of the District Court adverse to Morrison was passed down on July 9, 1903. Shortly previous thereto an application had been made to the court for leave to amend, alleging that the vessel was enrolled at the port of Boston. We assume that the purpose of this application was to enable the petitioner to rely on the alleged statutory lien."

"A vessel is domestic at the port where the owners are domiciled or reside and foreign at other ports, wherever she may be registered or enrolled."

Decided May 4, 1904.

The New Brunswick, 129 Fed. 893.

"And a state statute limiting the time within which liens on vessels given thereby must be enforced does not restrict or affect the jurisdiction of a court of admiralty to enforce a lien given by the general maritime law."

(Decided October 16, 1905, by the Circuit Court of Appeals for the Ninth Circuit.)

The San Rafael, 141 Fed. 270.

A lien was asserted against a foreign vessel for coal furnished in New Jersey. The owner of the vessel resided in New York. The supplies were therefore furnished, not in her home port, but in a foreign port. A lien was claimed under the statute of New Jersey. The court said:

"The Supreme Court of the United States, while holding that it is competent for the states to create such liens for necessities furnished to *domestic vessels*, said, "The right to extend these liens to foreign

vessels in any case is open to grave doubt.' The *Roanoke*, 47 L. Ed. 770. In *The Electron*, 74 Federal, 689, the question was before this court, but not passed upon because we had already certified it to the Supreme Court in *The Kate*, 41 L. Ed. 512. Although the cause thus certified was disposed of on other grounds, the expression of the opinion above quoted from the *Roanoke* sufficiently indicates the principles to be applied by the inferior courts in such cases. *The Golden Rod*, being in a foreign port, was not affected by the provisions as to maritime lien contained in the New Jersey statute."

(Decided January 20, 1907, by the United States Circuit Court of Appeals for the Second Circuit from the Southern District of New York.)

The Golden Rod, 151 Fed. 6.

An action was brought in the District Court of Massachusetts against the *Cimbria*, which was owned by a Maine corporation, prior to June 6th, 1906. It ran as a passenger steamer between Bangor and Bar Harbor and other places in Penobscot Bay and adjacent waters, remaining at Bangor when not engaged in active employment. In the spring or early summer of 1906 she began to run as a passenger steamer between Boston and Nahant in this district. She left Bangor on June 6th, 1906, to enter this employment and at about the same time the president, secretary and general manager of the company came to Boston and there conducted the business of the vessel. Certain of the petition-

ers claimed liens for supplies furnished her while she was in the State of Maine, for which they had a lien under the Maine statute. A New York corporation and a Rhode Island corporation each claimed liens for materials shipped to Bangor from those states under contracts, pursuant to which the title passed at New York and Rhode Island respectively. The court held:

"1st. That neither of these petitioners acquired any lien under the general maritime law. 2nd. That though the petitioners parted with their goods at their places of residence, New York and Providence, in which ports the vessel, if present, would have been foreign, she was in fact in Bangor, her home port, at the time. 3rd. That no lien can be acquired for supplies upon a vessel in her home port unless one is given by the local law. 4th. Upon a domestic vessel while outside the state in which she belongs, *as upon a foreign vessel while within that state, no lien can be acquired by virtue of the local law. Such cases are governed by the general maritime law, the administration of which is beyond the control of state legislation.*"

(The court cited the *Roanoke*, 47 L. Ed. 770, the *New Brunswick*, 129 Fed. 896, and the *Golden Rod*, 151 Fed. 6.)

(Decided April 25, 1907, by the District Court of Massachusetts.)

The Cimbria, 156 Fed. 378.

"It is also true that, so far as any state statute may have reference to any work done on a foreign

vessel, it is ineffective, because, if it contravenes in any respect the regulations known to admiralty law, it would be wholly invalid, and if it does not contravene them, it would simply be a useless enactment. *The Roanoke*, 47 L. Ed. 770."

(Decided December 26, 1908, by the Circuit Court of the District of Maine, Putnam, Circuit Judge.)

Berwind-White Co. vs. Metropolitan S. S. Co., 166 Fed. 782.

The above case went on appeal to the Circuit Court of Appeals for the First Circuit and Circuit Judge Lowell, in the course of his opinion, said:

"In the *Roanoke*, 47 L. Ed. 770, the Supreme Court held unconstitutional a state statute which purported to give a lien upon a foreign ship for supplies furnished to a contractor, because the statute was unconstitutional interference with the interstate commerce. But the lien here in question did not arise in the course of the commercial life of the vessel. It came into existence before the structure, which is now a vessel, had become an instrument of commerce."

(Decided August 18, 1909, by the Circuit Court of Appeals, First Circuit.)

Berwind-White Coal Mining Co. vs. W. & A. Fletcher Co., 173 Fed. 471.

There was a libel *in rem* by an iron works company against the steamer *Natchez* for repairs. Parties intervened asserting liens. The vessel was owned by a Mississippi corporation and ran be-

tween New Orleans and other points on the Mississippi River; but from November, 1911, was laid up for about two years. The company then concluded to run her.

Among the lien claimants was Charles Levy, who claimed as subrogee of a watchman employed on the boat. The court said:

"It may be considered as settled that a watchman, under such circumstances, has no lien under the general maritime law or the Act of Congress of June 23, 1910. * * * Levy, however, relies on Article 3237 of the Civil Code of Louisiana as giving a lien for such services and not superseded in this particular by the Act of June 23, 1910. *But state laws do not create maritime liens on foreign ships.* (Citing *The Roanoke*, 47 L. Ed. 770.)

(Decided July 12, 1916, by the District Court of the Eastern District of Louisiana.)

The Natchez, 236 Fed. 588.

Where a Massachusetts schooner was run down and sunk by a British steamer on the high seas, there is no right of action for the wrongful death of those of the crew of the schooner who were lost, and the laws of Massachusetts giving a right of action for wrongful death have no application, for, to give it application, would be to give the statute extra-territorial effect.

(Decided November 15, 1917, by the Circuit Court of Appeals for the First Circuit.)

The Sagamore, 247 Fed. 743.

In the case of

The Lyndhurst, 48 Fed. 839,

libelant's claim was for materials furnished in New York for the repair of the *Lyndhurst*, which was a foreign vessel. The law of New York allowed a lien for supplies upon any vessel by filing a notice thereof within 30 days in the county clerk's office, which lien was to continue for one year. The court held that the statute was not applicable to foreign vessels; that the period of limitation of liens in admiralty, as against a bona fide purchaser, is a reasonable opportunity to enforce them, which rule the court applied to the case notwithstanding the New York statute.

Decided January 11, 1892.

Reference is also made to the case of

The Thielbek, 241 Fed. 209, 212,

as bearing on this question.

"A state may not pass any act which abridges or enlarges the responsibility or duties of maritime law. Rights in admiralty cannot be affected by state enactment."

The rights of a seaman must be the same in the ports of every state.

On page 571 is a discussion of the state laws providing for a cause of action for death arising from a marine tort.

(Decided June 3, 1914, by the District Court of the Northern District of Ohio, Eastern Division.)

Schuede vs. Zenith S. S. Co., 216 Fed. 566.

In admiralty, the chief of a fire department may be held liable for damages by a fire tug, notwithstanding the statute law and the common law to the contrary.

(Decided December 24, 1900, by the Supreme Court of the United States.)

Workman vs. Mayor, 45 L. Ed. 314.

In the case of

Corsica Transit Co. vs. Moore Grain Co.,
253 Fed. 689,

it is held that the decision of the Supreme Court of the United States in *Jensen* case "*has practically removed all doubt on that subject*" (p. 691 at bottom).

The court says:

"But aside from this, we are of the opinion that a state has no power to grant a maritime lien against foreign vessels navigating, as alleged in the libel, the Great Lakes, for causes of action which have never been recognized as maritime liens" (citing Judge Story in *The Chusan*, *The Roanoke*, *The Lyndhurst*, *Southern Pacific Co. vs. Jensen*, and other cases above cited).

The court further says:

"The only authority which holds that a state statute giving a lien on a vessel for breach of an executory contract is valid and is applicable to a foreign vessel is *The Energia* (D. C.), 124 Fed. 842. *It has never been followed by any other court and we are unable to follow it.*"

See, also, the recent case of *Rohde vs. Grant Smith Porter Co.*, 259 Fed. 304.

.AMOUNT OF DECKLOAD

In order to show liability for damages on account of the refusal of the captain of the "Saigon Maru" to take any additional deckload, it was necessary to prove not only that the vessel could have safely carried such additional amount, but also that the captain did not act honestly or in good faith in making his decision or that he was incompetent.

The courts below seem to have considered it sufficient to determine merely that the vessel could have carried a greater deckload.

The captain's refusal to take any more cargo on deck was based principally on these grounds:

(1) That the stability of the vessel was such that any additional load would have made her top-heavy;

(2) That the vessel's steering rod rested on and passed through the tops of upright iron stanchions anchored to the bulwark rail in the aft part of the vessel, and the raising of the deckload to any considerable height above this rail was very dangerous because of the likelihood of the deckload shifting or of some part of it getting loose in a storm and impinging upon and bending or breaking either the steering rod itself or one of its supporters and thus rendering the vessel unmanageable.

(3) The proposed voyage was 10,000 miles in length and the route of the vessel was through the

China Sea in the typhoon season and the Indian Ocean in the monsoon season. Both the typhoon and the monsoon were especially dangerous to a top-heavy vessel, and, in the typhoon in particular, any derangement of the steering gear was likely to prove disastrous.

As to the weight to be given to the District Court's finding of fact as to the amount of deckload:

This finding of fact should not be accorded the weight usually given by this court to a finding of the trial court for the following reasons:

(a) The District Judge in making this finding based it in large part upon an incorrect version of the testimony of Captain Yamaguchi, the predecessor of Captain Yamamoto as master of the "Saigon Maru" and one of the claimant's most important witnesses, in that said version represents the witness as saying without qualification that, in his opinion, "the vessel could have carried 60 tons more on deck," or a total deckload of 383 tons; and, in that connection, the court added that "this would make a very substantial addition to the deckload." (R. 899). The District Judge evidently overlooked the facts that the witness qualified his statement above quoted by saying that, with such additional amount on deck, she would be a "little tender" (R. 805) and that he further testified that, for the best condition of stability, she should have carried 90 tons less than she did carry or a total deckload of only 233 tons (R. 806).

(b) The District Judge admitted in evidence

over claimant's objection, and, in rendering his decision, considered a list of four vessels submitted by Mr. Wheelwright, libelant's general manager, showing the respective loads carried by each (R. 99, 105, 890) not considering apparently that every vessel has its own peculiarities and that the fact of the carriage by one or more other vessels of the same size of greater deckloads, does not even tend to prove that the "Saigon Maru" could have done so.

(c) The court's finding is against the overwhelming preponderance of the testimony, especially in view of the weight which should be given to the decision and testimony of Captain Yamamoto and the testimony of Captain Yamaguchi, his predecessor as master of said vessel.

(d) The testimony of claimant's most important witnesses was taken by deposition.

And, as respects this finding, we submit that the Circuit Court of Appeals is in no better position than this court to arrive at a correct conclusion on that subject.

As to the question of liability on account of not taking a greater deckload:

Neither of the lower courts, in reaching their conclusion that the vessel was liable, found that Captain Yamamoto was incompetent or abused his discretion, or that, in making his decision, he did not exercise his honest judgment. On the contrary, His Honor of the District Court expressly found that, although Captain Yamamoto committed "an

error in judgment," he did so "*all in good faith on his part*" and that "*there was undoubtedly no ulterior motive impelling the captain to refuse to take on board a larger deckload.*" (R. 900). Moreover, the record shows without contradiction that Captain Yamamoto was an exceptionally competent mariner; that he was well educated and trained for his profession and had had a large and varied experience, especially in Oriental waters; and that he was familiar with his vessel and her behavior at sea, especially in the dangerous waters it was to traverse (R. 711, 714, 724, 726, 745); that he made his decision against the taking of any additional deckload, although his company's profits for the voyage would have been greater had he done so (R. 105-6).

To the above quoted finding, the trial judge added the conclusion (or the finding), that "obviously he" (Captain Yamamoto), "was unduly timid." (R. 900). If this was only His Honor's conclusion resting for its support merely on his opinion that the vessel could have carried a greater deckload, it means merely that he differed from the captain as to what was a safe load for the vessel; but, if it is to be taken as a finding of fact, it is unsupported by any testimony. There is nowhere in the record a particle of evidence even tending to prove that Captain Yamamoto was timid, either as a man or as a shipmaster, or that he was incompetent.

THE MASTER'S DISCRETION.

In all matters respecting the loading and management of his vessel the master is being constantly called upon to decide what kinds or amount of cargo can be safely carried or, as in the present case, how much cargo can be safely carried on deck. As he is not expected to be infallible and is liable to err, the law, from humane considerations, *encourages him to err on the side of safety*; and when, being competent, he does so err, in good faith, in the exercise of his honest judgment and solely out of consideration for the safety of his vessel, its cargo and the lives of those aboard, the courts will not require either him, his employer or his ship to compensate a shipper for any damages sustained on account of such error in judgment. This proposition is abundantly supported by the authorities.

"The master, if competent, has discretion in the matter of loading, the quantity to be taken on deck and elsewhere, consistent with the vessel's seaworthiness in view of the voyage, and, if acting in good faith, his judgment is controlling, though he may not modify the owner's contract."

The Addison E. Bullard, 252 Fed. 241.

"How deep a particular vessel may safely and prudently be laden with a particular cargo is a matter of judgment. Both the owner and charterers know, when the contract of affreightment is made, that the master, in a foreign port must, at the time, decide this question. They know also, that inasmuch as differences of model and spars, and

perhaps other circumstances affect this question, a master who knows his particular vessel and her performance at sea, can judge better than a stranger what cargo she will safely carry. And though the master is the agent of the shipowner in receiving and transporting cargo, yet he may be considered as relied upon by the shipper not to receive too much cargo and thereby subject it to risk of damage and loss. *Not to overload his vessel is a duty which the master owes to all concerned.* They have a right to expect him to have competent skill and judgment in this particular, and fairly and carefully to exert them. They are not absolutely bound if he makes a mistake. *But when he is a person of sufficient skill and judgment and peculiar knowledge of the vessel, and decides honestly and faithfully, very clear evidence of a mistake should be required before his act is pronounced against by the court."*

Weston vs. Foster, Fed. Case No. 17,452.

"The judgment of the master and officers as to the proper trim of the ship and the proper distribution of the cargo and weights is much more valuable than that of the witnesses who expressed opinions in answer to hypothetical questions. *The former were acquainted by experience with the characteristics of the ship, and, as is well known, two ships built on the same lines act differently under similar conditions of wind and sea."*

The Frey, 106 Fed. 319.

The case of

The Giles Loring, 48 Fed. 463, 469,

is especially instructive in that it holds that the owner of a vessel who places upon it an excessive deck load *upon the insistence of the charterer himself is liable to the charterer* for any damages he may sustain by reason of such excessive deck load—that the captain can not, as between the owner and the charterer, shift the responsibility for the proper loading of his vessel onto the charterer.

There was the same holding in the case of

Olsen vs. United States Shipping Co., 213 Fed. 18, 20, 21.

In the case of

Birt et al. vs. Hardie, 132 Fed. 61, 65, 66, the charterers of a vessel, after having loaded it partly with petroleum, insisted on putting aboard additional cargo of three hundred tons of flour, but the captain, being apprehensive that the flour might be damaged by the fumes from the petroleum, declined to load the flour and sailed without it. A libel *in personam* was brought against the owners for failure to take this flour. After hearing the evidence, the court sustained the master. The court said:

"The evidence leaves it very uncertain whether or not a risk of damage actually existed. It is probable that, owing to the facilities for ventilating the vessel, no damage would have ensued from the fumes on this voyage. A great many witnesses have been examined and the testimony of those fa-

*miliar with this trade tends strongly to support the libelant's contention to such effect, but it appears that a very general impression prevails that oil and flour can not be carried together without injury to the latter, even with the best facilities for ventilation. * * * Trade convenience no doubt requires that it should be hampered with as few obstacles as possible, among which may be considered the demands for indemnity in connection with its ordinary shipments, about the propriety of which there should be no question. If this were such a shipment I should have no hesitation in holding with the libelant, but we do not seem to have progressed to that point where a master's apprehension of danger to cargo, if well founded, should be lightly set aside for the convenience of trade. * * **

See also:

Weston vs. Minot, Fed Case No. 17453.

Boyd vs. Moses, 7 Wall. (U. S.), 320; 19 Law Ed. (U. S.), 192.

Burdge vs. 220 Tons of Fish Scrap, 2 Fed. 783.

The Addison E. Bullard, 252 Fed. 241.

The Frey, 106 Fed. 319.

The Kronprinzessin Cecilie, 238 Fed. 668.

Lawrence vs. Minturn, 17 Howard (58 U. S.), 100-116; 15 Law Ed. (U. S.), 62.

The Clematis, Fed. Case No. 2876.

The S. S. "Styria" vs. Morgan, 46 Law Ed. (U. S.), 1027, 1033.

Phelps, James & Co., vs. Hill, L. G. B. Div.
1891 (1), page 605.

Yamamoto's Competency.

Was Yamamoto's education, sea experience and knowledge of his ship and of the waters it was to traverse such as to entitle his judgment as to what was a safe deck-load for his vessel, the force which the law, under such circumstances, gives to that of a competent master?

He was 41 years old and a graduate of the Imperial Nautical College at Tokio, Japan, which is the highest educational institution in Japan for teaching navigation. He attended that college five and one-half years, of which two years were spent in the school itself in Tokio, three years sailing in steamers for practical training, and a half year in the Japanese navy (R. 711-2). After completing his college course, he joined the Osaka Shosen Kaisha and *had been with that company ever since*. During this period he was second officer for two years, chief officer for three years and captain or master for twelve years. *Altogether he had been in the employ of the Osaka Shosen Kaisha continuously for a period of seventeen years* (R. 712-13): During this period he navigated the whole of the Japanese, Chinese and Korean coasts, also on the lines from Japan to Java, from Japan to Bombay and from Japan to America. He served as master of vessels on the China Coast for about four years and had made about one hundred trips through the China Sea and had often encountered typhoons

there (R. 713-14, 724). He was master of the "Saigon Maru" for one year and seven months before he went to Portland to take the lumber cargo in question and also for a period of seven and one-half months since then, making the total period of his experience as master of the "Saigon Maru" two years and two and one-half months (R. 713). During this time, with the exception of the voyage in question, he was on the run from Japan to Bombay, and, counting that voyage, had made in all seven round-trip voyages from Japan to Bombay, all as master of the "Saigon Maru," involving fourteen trips through the China Sea and the Indian Ocean (R. 714, 724). On these voyages he usually carried a miscellaneous cargo to Bombay and a cotton cargo back (R. 726, 745).

As bearing upon the honesty of the captain's judgment and the weight to be given to it, attention is called to a provision of the charter party which provides that libellant shall pay claimant "for the use of said vessel during the voyage aforesaid two hundred and forty (240) shillings per thousand feet board measure."

His testimony, which was by deposition, confirmed his decision and was corroborated by the evidence of Captain Yamaguchi, his predecessor as master of the "Saigon Maru."

Captain Yamaguchi was a graduate of the Imperial Nautical College at Tokyo. Immediately after his graduation he took the position of third officer on a steamer belonging to the Nippon Yusen Kai-

sha, Japan's largest steamship company, and continued with this company until 1906, when he entered the employ of the Osaka Shosen Kaisha as second officer of one of its steamers and then became first officer and afterwards master of a steamer. For the past six years he had served in the capacity of master of large vessels of the type now plying between the United States and Japan, and had had six years' experience in navigating the China Sea. He had also made eleven round-trip voyages between the United States and Japan, and is now master of the *Alps Maru*. (R. 797-800).

That he was master of the "Saigon Maru" for a period of two years and eight months and, as such master, made ten voyages on that vessel from Japan to Bombay at various seasons of the year, and also made a coast-wise trip between Kobe and the northern part of Japan. All this was, of course, before Captain Yamamoto made the voyage in question (R. 799-800).

The testimony of these two sea captains was supported by the depositions of F. Kawamoto, Lloyd's surveyor at Nagasaki who surveyed the vessel upon its arrival there with the cargo in question (R. 834-853), and Y. Yano, claimant's port captain who superintended the loading of the vessel at Portland (R. 855-883), and also the testimony in open court of Captain Okuda, an expert on the loading of vessels (R. 587-641), and of Francis W. Cullum, a veteran captain of the Blue Funnel Line (R. 473-587).

Against claimant's testimony we have only that of Mr. Wheelwright, libelant's general manager, a man wholly without sea experience, and four stevedores, neither of whom had any more acquaintance with the vessel than was obtainable from observing her at the wharf in Portland and whose sea experience was very limited.

As the evidence on this branch of the case is very voluminous, we shall refrain from any further mention of it.

In concluding on this point, we most respectfully submit that no judge, sitting in judgment after a vessel has arrived safely at destination, should condemn her master for not taking a greater deckload unless the evidence impugning his decision is so clear and convincing that the judge himself, had he been present at the time of the loading, would have been willing to have taken ^{the} responsibility of ordering such additional load put aboard. It is very difficult for any man not to be braver after all danger has passed than when, burdened with responsibility, he contemplates the probabilities and possibilities of the unknown future.

MEASURE OF DAMAGES.

Libelant's claim for damages consists of two items, namely:

- (1) Loss of "profits," i. e., the amount of profit it claims it would have made on the additional lumber, had it been carried to Bombay.
- (2) The amount of its alleged liability for damages to Gillanders-Arbuthnot & Company for its

failure to deliver to them 400 tons of 50 cubic feet, or 600 board feet, per ton.

The only reference to this question of the amount of damages in the opinion of the Circuit Court of Appeals is contained in the two concluding sentences of the opinion, as follows:

"So, too, do we think we are concluded by the findings and conclusions of the learned judge upon the question. To review the record upon the subject in detail would serve no useful purpose." (R. 1049).

As practically the only questions involved in either of the above items of damage are questions of law, we are at a loss to understand upon what theory the appellate court considered itself in any way "concluded."

We shall first consider the claim for

LOSS OF "PROFITS."

The learned judge of the District Court held that libellant was entitled to recover, on account of "loss of profits" it sustained by reason of being unable to complete its Bombay sale, at the rate of \$7.955 per thousand feet on the 308,441 feet of lumber it should have shipped, but did not ship, to the Bombay firm, amounting in the aggregate to \$2,453.65 (R. 910-11). His Honor obtained this figure of \$7.955 per thousand from libellant's "Account of Sales" appearing on page 123 of the Record, a document received in evidence over claimant's objection. In this statement the item of \$34,131.54 given under the head of "Costs and Charges" as the value of the

lumber at Portland was the *purchase price* paid by libelant to the Inman-Poulsen Lumber Company therefor, pursuant to a *sale contract between them made on or about March 20, 1917* (R. 354-5, 437), nearly three months prior to the date of the departure of the vessel from Portland and nearly five months prior to the date of her arrival at Bombay, on both of which last mentioned dates the market value of such lumber at Portland was about \$8.50 higher than said March purchase price and was, under the rules of law, the true basis for the calculation of loss or profit on the sale; and, moreover, *claimant had no knowledge or information whatever of this sale contract until the trial, during the cross-examination of libelant's general manager.*

We submit that there is no authority for the rule thus applied by the court.

The general principle lying at the foundation of the rule for measuring damages in suits against carriers for refusal to receive goods for transportation is clearly stated by Judge Taft in the case of

The Oregon, 55 Fed. 666,

as follows:

"The pecuniary difference between the shipper's condition with the contract performed and his condition if the merchandise is not shipped, but remains at the port of shipment, is * * * his legal damage."

In this case, therefore, the legal damage, if any, to libelant is the pecuniary difference between its condition with such amount of additional lumber as the vessel should have carried still at Portland on

August 2nd, and the same lumber at Bombay on that date, taking into consideration the cost of getting the lumber from Portland to Bombay and the fact that it had been sold at a certain price in Bombay. Hence it is that all the authorities take the date the goods should have arrived at destination as the time as of which the difference between the values at the points of shipment and of destination are to be ascertained.

On the question of this claim of libelant for "Loss of Profits," the following rules seem established by the authorities:

(1) Where the shipper has *not* sold the goods at destination and is free to dispose of them at the market price there prevailing at the time of their arrival, the amount of his damages against the carrier is ascertained by deducting from the amount of the market value of the goods at destination at the time they should have arrived there, the amount of their market value at the point of shipment at the same time *plus* the cost of getting them to destination.

(2) But if the goods, prior to shipment, have been actually sold at destination, and the *purchase price of this sale is less than their market value at the time they should have arrived there*, the shipper's damages are ascertained by deducting from the amount of this sale price the amount of the market price of the goods at the point of shipment at the same time plus the cost of getting them to destination.

The General Rule.

(1) The general rule (rule No. 1 above) is declared by the authorities as follows:

"The measure of damages for the breach of a contract to transport from one market to another *an ordinary article of merchandise* always to be found in the market is the value at the place of destination at the time when by the contract the merchandise should have arrived there, minus its value at the place of shipment at said time with the agreed freight added and such expenses as the shipper would have incurred in getting the goods to destination had the contract been perfected."

Wards Co. vs. Elkins, 34 Mich. 439.

"In an action for damages for refusal to perform a contract to furnish transportation the measure of damages is the loss of the benefit of the transportation, that is, the difference between the market value at the destination when the goods should have arrived if carried in accordance with the contract, and the value at the same time at the point of shipment, less what it would have cost the shipper under the contract to have had the goods transported, that is, freight charges and other necessary expenses."

6 Cyc, 525.

This rule is given in almost the same language by the following authorities:

3 Hutchinson, Carriers, 3rd Ed., section 1370, page 1632.

5 American & English Encyclopaedia of Law, page 388.

Missouri Railway Co. vs. Witherspoon, 38 S. W. 833.

The A. Denicke, 138 Fed. 645.

The Oregon, 55 Fed. 666.

Harvey vs. Conn. & Pass. R. Co., 124 Mass. 421; 26 Am. Rep. 673.

Bridgman vs. Steamship "Emily", 18 Iowa, 509.

Harvey vs. Grand Trunk Ry. Co., Fed. Case No. 6180.

Inman vs. St. Louis Ry. Co., 37 S. W. 37.

Chattanooga R. Co. vs. Thompson, 65 S. E. 285.

The learned judge of the trial court, after stating the foregoing general rule, says:

"This, like all general rules, however, is inapplicable in exceptional cases.

"It is a feature in the present case that, owing to war conditions, libelant was practically unable, at the time of default, to procure transportation to carry to Bombay the lumber left behind. If it could have been procured at all, it would have been at very greatly increased cost, and, if libelant had resorted to that means of invoking the general rule, the claimant would have suffered beyond what would seem to be reasonable damages." (R. 909).

We submit that, as respects the measure of damages in this case, it makes no difference whatsoever whether or not other means were available to carry this additional lumber to Bombay in view of the fact that no other means were actually employed.

Besides, there is nothing exceptional or extraordinary about the damage features of this case. The testimony shows that Oregon pine lumber of the kind in question had a definite market value both at Portland, Oregon, and in Bombay, India. Libelant's witnesses Clapham and Hunter both testified positively that its market value at Bombay on August 2, 1917, was 165 rupees per ton of 50 cubic feet c. i. f. Bombay (R. 673, 700); and Mr. Wheelwright and Mr. Dant testified as to its market value in Portland, Oregon, on June 4 and August 2, 1917. (R. 407, 429, 641-5).

Moreover, we fail to perceive how the considerations advanced by the court justify the calculation of libelant's "loss of profits" on the basis of its March purchase. At best, the fact that libelant bought this lumber in March at the base price of \$11.50 is a "special circumstance" of which claimant at no time had any knowledge or information whatsoever. Nowhere in the testimony is there disclosed the slightest circumstance brought to claimant's knowledge even tending to show that any such purchase had been or would be made. In fact, as stated before, the first disclosure on this subject was from Mr. Wheelwright during his cross-examination, (R. 354-5, 437).

It is elementary that to charge a carrier with damages caused by special circumstances, it is necessary at the very least that such special circumstances be brought to his knowledge before or at the time of the execution of the contract.

Hadley vs. Baxendale, 9 Exch. 341.

Harvey vs. Conn. & Pass. R. Co., 124 Mass. 421; 26 Am. Rep. 673.

Globe Refining Co. vs. Landa Cotton Oil Co., 190 U. S. 540; 47 Law Ed. 1171.

British Columbia Mill Co. vs. Nettleship, L. R. 3 C. P. 499.

Clyde Coal Co. vs. Pittsburg R. Co., 26 L. R. A., N. S., 1191.

Guetzkow Bros. vs. Andrews & Co., 52 L. R. A. 209, 217.

Rule in Case of Sale at Destination Below Market.

(2) In support of Rule No. 2 above referred to holding that in cases where the goods have, prior to shipment, been sold at destination at a price less than the market price prevailing there at the time they should have arrived, such sale price, instead of the market price at destination, is the minuend to be used in estimating the loss of profits on the goods, we cite the case of

Missouri, K. & T. Ry. Co. vs. Witherspoon, 45 S. W. 424.

This branch of the rule is, we submit, the one to be applied in this case, as libelant had sold the lumber in Bombay. Even if the "Saigon Maru" had carried an additional amount of lumber on deck, this lumber would not have been worth to libelant the market value prevailing at Bombay at the time of its arrival there, but only the price at which libelant had sold it to Gillanders, Arbuthnot & Company, as it was bound to deliver any such additional

deck lumber to that firm under its contract with them, and was not at liberty to sell it in the market. In fact, libelant's statement of his alleged profits, appearing upon page 123 of the Record, purports to adopt the sale price at Bombay as the figure upon the basis of which it has calculated its profits.

LIBELANT LOST NO PROFITS

By said statement, which is designated as "Account of Sales," libelant seeks to make it appear that on this shipment it actually made a total profit of \$21,710.57, or \$7.955 on each thousand feet shipped, and would, therefore, have made the same rate of profit on the lumber not shipped.

As a matter of fact, libelant suffered a loss on this shipment.

The "joker" in Mr. Wheelwright's statement is this item (R. 123):

"June 7th, Lumber 2,729,005 ft. @ \$11.50 base,
less 2½ per cent. twice, \$34,131.54"

When this statement was introduced in evidence nothing was said by the witness as to when the lumber was actually purchased. It was not until he was asked at the trial on cross-examination the direct question as to when he bought the lumber that it was disclosed that the purchase price had been fixed by a sale contract, made in the preceding March (R. 354-5, 437). At that time, the market value (base price) of the lumber was the same as the above contract price, i. e., \$11.50 per thousand, while on August 2nd, the date the lumber shipped arrived at Bombay, and, of course, the date

the lumber not shipped would have arrived there, the market value at Portland was the base value of \$20.00, making a difference of \$8.50 per thousand feet (R. 407, 429). This difference, applied to the 2,729,005 feet shipped, would, therefore, according to Mr. Wheelwright's own figures, amount to about \$23,205.00, which not only completely obliterates his estimated profit on the shipment, but also leaves him with an actual loss.

**THE ITEM OF LIBELANT'S CLAIM BASED ON
THE CLAIM OF GILLANDERS, ARBUTH-
NOT & COMPANY AGAINST IT.**

We shall now consider the other item of libelant's claim, i. e., its alleged liability to Gillanders, Arbuthnot & Company.

Libelant claimed, and the court found, that, at about the time of the execution of the charter-party in question, i. e., about March 20, 1917, it contracted to sell to Gillanders, Arbuthnot & Company c. i. f. Bombay 3,300,000 feet of lumber, which it expected the "Saigon Maru" would carry to Bombay, pursuant to the charter-party; that on account of the failure of the vessel to take a full deck-load, it was unable to deliver to the Bombay firm the full amount it had agreed to sell, the amount delivered being short of the amount agreed to be sold by 400 tons or loads of 50 cubic feet or 600 feet board measure per ton or load; that when the lumber arrived at Bombay on August 2nd, the market price there of such lumber was greater than the price at which it had been sold to Gillanders, Arbuthnot & Company,

in consequence of which Gillanders, Arbuthnot & Company has a claim against them based upon the difference between the Bombay market value and said sale price, and an additional claim because there was not a due proportion of the big timbers contracted for; that libelant recognizes this claim to be just, but Mr. Wheelwright admitted at the trial that it *had not been paid although it had accrued about two and a half years before the date of the trial*; that apparently the parties, pursuant to some agreement between them, which is mutually pleasing, have decided to wait until this case is decided.

Claimant maintains that this alleged liability to Gillanders, Arbuthnot & Company is not a recoverable item of damage for the following reasons:

- (1) It is too remote, speculative and contingent.
- (2) It arises out of a collateral contract between that firm and libelant, to which claimant was not a party, and of which *the terms and conditions were not communicated to the claimant* before the execution of the charter-party; much less was there any understanding that claimant accepted the charter-party with the special condition attached to it, that it would be answerable for any damages libelant might sustain by reason of any claim on the part of its Bombay purchaser.

Globe Refining Co. vs. Landa Cotton Oil Co.,
190 U. S. 540; 47 Law Ed. (U. S.) page
1174, first column.

(3) Libelant has never paid the claim in question.

This claim of damage is so remote, speculative and contingent that it could not be made a proper item of recovery, even if the contract between libelant and the Bombay firm had been closed and a copy of it had been delivered to claimant before the execution of the charter-party. To make it a recoverable item, it must have been *actually contracted about*. Whether the Bombay firm, in case of a shortage of delivery, might make a claim against libelant would depend, (1) upon whether, when the lumber should have arrived at Bombay, the market price had gone up or down; (2) upon whether the purchaser would insist upon performance and the payment of damages, i. e., upon the action or non-action of a particular person.

In Street's "Foundations of Legal Liability," vol. I., page 448, the author, referring to damage claims of this character, says:

"If the damage which the plaintiff seeks to recover as special damage, appears to be so far speculative and contingent as to be legally remote, no amount of notice as to special conditions which make that damage possible will make the defendant liable therefor. To bring damage which would ordinarily be treated as remote, within the category of recoverable special damage, *it is necessary that the conditions should be actually contracted about. It must be so far in the mind and contemplation of the parties as virtually to be a term of the contract.*

Thus in *Smeed vs. Foord*, 1 El. & El., 602; 102 E. C. L. 602, it was held that the loss arising from the *fall in the market for wheat* could not be recovered. This was an element of damage which was so far speculative and remote as not to be recoverable without being made a term of the contract."

The learned judge of the District Court does not cite any case as being particularly applicable to this second head or item of damages, but on pages 905-9 of the Record cites several authorities intended, we suppose, to be applicable both to the right to recover for loss of profits and the right to recover the amount of the claim of the Bombay firm.

On page 905 of the Apostles His Honor, the District Judge, by making the quotation appearing there from Benjamin on Sales, considered the rules prescribing the measure of damages for the breach of sale contracts as applicable to the admeasurement of damages for the breach of a contract of affreightment; and this court has, in the case of *Globe Refining Co. vs. Landa Cotton Oil Co.*, *supra*, applied the rules for measuring damages for the breach of an affreightment contract to the ascertainment of damages for the breach of a sale contract. In that case, however, this court supports the rule above cited from Street's "Foundations of Legal Liability" and says:

"It may be said with safety that *mere notice* to a seller of some interest or probable action of the buyer is not enough, necessarily and as a matter of,

law, to charge the seller with special damages on that account if he fails to deliver the goods."

And a little further on the court says:

"And it is nowhere alleged that the defendant assumed any liability in respect of this uncertain element of charge."

This court then quotes with approval the holdings in the following English cases:

British Columbia Saw Mill Company vs. Nettleship, L. R. 3 C. P. 499-500;

Horne vs. Midland R. Co., L. R. 7 C. P. 583, 591, S. C. L. R. 8 C. P. 131;

Elbinger, etc. vs. Armstrong, L. R. 9 Q. B. 473, 478.

As this court seems to have based its decision in the case above cited almost wholly upon these English cases, it is pertinent to consider the language of the opinions in these cases and especially the excerpts therefrom quoted in the opinion.

In the case of

Elbinger, etc., vs. Armstrong, L. R. 9 Q. B. 473, 478

the court says:

"It may be asked, with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without going on to show that he was *told that he would be answerable for them, and consented to undertake such a liability.*"

And in the case of

British Columbia Saw Mill Company vs. Nettleship, L. R. 3 C. P. 499, 500

Mr. Justice Willis, who wrote the opinion, says:

"I am disposed to take the narrow view that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for. * * * If that (a liability for the full profits that might be made by machinery which the defendant was transporting, if the plaintiff's trade should prove successful and without a rival) had been *presented to the mind of the ship owner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it.* And though he knew, from the shippers, the use they intended to make of the articles, it would not be contended that the *mere fact of knowledge*, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. *The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.*"

In the case of

Horne vs. Midland R. Co., L. R. 7 C. P. 583, 591; S. C. L. R. 8 C. P. 131,

this language is repeated by the same judge, who, at the close of his opinion, adds:

"There must, if it be sought to charge the carrier with consequences so onerous, be distinct evidence *that he had notice of the facts and assented to accept the contract upon those terms.*"

In the *Globe Refining Company* case above cited, in which the above quotation occurred, the Supreme Court, referring to the sufficiency of the pleading in that case, in which also there was "an attempt to hold the defendant liable for the breach of the plaintiff's contract with third persons," says:

"The allegation is that the fact that the plaintiff had contracts over was well known to the defendant and that 'defendant had contracted to that end with plaintiff' ". The Supreme Court held that this was not a sufficient allegation that the special circumstance in that case was actually contracted about.

Globe Refining Company vs. Landa Cotton Oil Company, 190 U. S. 540; 47 Law Ed. U. S. 1173-4.

See, also,

Pusey, Jones Co. vs. Combined Locks Paper Co., 255 Fed. 700;

Stebbins vs. Selig, 257 Fed. 230.

And this court holds that, "The consequences must be contemplated at the time of making the contract" (47 Law Ed. 1173).

Although we contend that the rule above laid down by this court is controlling, it may not be amiss to cite a few well considered state cases declaring the same rule, as follows:

Harvey vs. Conn. & Pass. R. C., 124 Mass.
421; 26 Am. Rep. 673;

Clyde Coal Co. vs. Pittsburg R. Co., 26 L. R.
A. N. S. 1195; 75 At. 596;

Masterton vs. Mayor of Brooklyn, 7 Hill (N.
Y.) 61; 42 Am. Dec. 38;

Fox vs. Harding, 7 Cush. 516;

Hoy vs. Grounoble, 75 Am. Dec. 628.

Respectfully submitted,

FRANK ADAMS HUFFER,

WILLIAM H. HAYDEN,

GERALD H. BUCEY,

Counsel for Petitioners.

IN THE SUPREME COURT OF THE UNITED
STATES.

OSAKA SHOSEN KAISHA, a corpora-
tion, and UNITED STATES FIDELITY
& GUARANTY COMPANY, a Corpora-
tion,

Petitioners,

VS.

PACIFIC EXPORT LUMBER COMPANY, a
Corporation,

Respondent.

NOTICE

TO MESSRS. ERSKINE WOOD and M. M. MAT-
THIESSEN,

Counsel for Respondent:

Sirs:

PLEASE TAKE NOTICE, That on Monday, the
3rd day of October, 1921, upon the opening of the
court, or as soon thereafter as counsel can be heard,
the foregoing petition and brief, together with a
certified copy of the entire transcript of the record
in the case, will be presented and submitted to the
Supreme Court of the United States, in its court-
room in the Capitol at Washington, D. C., in pur-
suance of its rules, in such cases made and provided.

Dated this 15th day of July 1921.

WILLIAM H. HAYDEN,
Of Counsel for Petitioners.

OPINION OF CIRCUIT COURT OF APPEALS.
IN THE UNITED STATES CIRCUIT COURT OF
APPEALS, FOR THE NINTH CIRCUIT.

OSAKA SHOSEN KAISHA, a Corpora-
 tion, Claimant of the Japanese
 Steamship "Saigon Maru," her
 tackle, apparel, etc., and UNITED
 STATES FIDELITY & GUARANTY COM-
 PANY, a Corporation,

Appellants,

No. 3609

vs.

PACIFIC EXPORT LUMBER COMPANY, a
 Corporation,

Libelant and Appellee.

UPON APPEAL FROM THE UNITED STATES
 DISTRICT COURT FOR THE DISTRICT
 OF OREGON.

Before GILBERT, ROSS and HUNT, Circuit Judges.
 ROSS, Circuit Judge:

The appellant Steamship Company is a Japanese corporation and the owner of the steamship "Saigon Maru," on which it agreed by charter-party made with the appellee, a corporation of the State of Oregon, to carry from a port on the Columbia or Willamette river a full cargo of lumber, including a full deckload, to Bombay, India, and there deliver the same to parties to whom the appellee contracted to sell and deliver it. The other appellant is surety only. In pursuance of the terms of the charter-party the steamship came to Portland and there received from the appellee a full cargo of the lumber

below deck, and 241,559 feet board measure on her deck, after which the captain of the ship refused to receive any more on the ground that it would not be safe to do so.

The court below found and held that the ship could safely have taken on deck 308,441 additional feet of lumber, and for her failure to do so held her liable *in rem* for damages in the sum of \$2453.65 with interest at the rate of six per cent. per annum from August 2, 1917, for and on account of loss of profits suffered by the libellant by reason of the ship's failure to carry and deliver at Bombay the 308,441 additional feet of lumber, and in the further sum of \$5192.86 for and on account of the claim for damages made against the libellant by the parties to whom the appellee had agreed to deliver the said additional 308,441 feet of lumber, with interest thereon at the rate of six per cent. per annum from August 2, 1917, besides costs.

The record shows, and the trial court so found in effect, that the 308,441 additional feet of lumber mentioned had not been sawed by the Mill Company from which the appellee had engaged it, because of the refusal of the captain to receive upon the deck of the ship more than the 241,559 feet that he had already taken aboard.

The primary question in the case, therefore, is whether in such circumstances the appellee ever acquired any lien on the ship, growing out of the 308,441 feet that the captain refused to receive and carry, in view of the facts relating thereto.

The respective positions of the opposing proctors may be briefly stated: On the part of the appellee the contention is that by taking on board a portion of the cargo covered by the charter-party the ship thereby entered upon the performance of the contract and that a maritime lien thereupon arose against her and in favor of the libelant, not only as respects the portion so actually received, but also as respects the entire contemplated cargo; whereas the appellants insist that there can be no lien against or in favor of the ship as regards any portion of a contemplated cargo not actually placed on board, or in the custody of or under the control of the ship, and especially so in respect to such portion of the contemplated cargo as does not in fact exist. The proctors for the appellee concede that it is the settled law in this country that where the contract remains wholly executory the ship is not liable *in rem* for any breach of it, but they urge that where she partly executes the contract, as by taking on board a part of the cargo, as was done in the present case, she thereby becomes liable *in rem* for all breaches of the contract.

The learned judge of the court below sustained this position of the proctors for the appellee, citing in support of his ruling the cases of *Scott vs. The Ira Chaffee*, 2 Fed. 401; *The Hermitage*, 12 Fed. Cs. 6410; *The Williams*, 29 Fed. Cs. 17,710; *The Director*, 26 Fed. 708; *The Starlight*, 42 Fed. 167; *The Oscoda*, 66 Fed. 347; *The Helios*, 108 Fed. 279;

The Oceano, 148 Fed. 131; *Wilson vs. Peninsula Bark & Lumber Co.*, 188 Fed. 52.

The contention of the appellants that the cases so cited are not here applicable we think not well founded. On the contrary, the last case there cited, *Wilson vs. Peninsula Bark & Lumber Co.*, 188 Fed. 52, which is a decision by the Court of Appeals of the Sixth Circuit, while based upon a state statute—as appears from the record of that case not, however, called to our attention until the petition for rehearing in the present case was filed—is, it seems to us, strikingly in point upon the question urged by the appellants, that the 308,441 feet of lumber had not been sawed prevented the lien claimed by the appellee from attaching to the ship. In that case the court said:

“The controlling facts disclosed by the testimony are substantially as follows: The libelant had contracted to furnish certain hemlock timber at the government’s locks in Sault Ste. Marie. It had purchased these timbers from the Worcester Company under a contract which required the latter company to deliver the timbers to the libelant, ‘f. o. b. water, delivered alongside boat at Chassel.’ It was necessary for the libelant to transport or cause to be transported the timber from Chassel to Sault Ste. Marie for delivery. For this purpose, on July 25, 1908, the libelees entered into the following contract with the libelant:

“‘On the part of the owners of the steamer “Mathew Wilson,” we hereby agree to carry approx-

imately one million feet of 12-12 hemlock timbers from Chassel, Mich., to Sault Ste. Marie, Mich.; said timbers to be delivered on or before November 15, 1908. The commencement of said delivery to be at your call in about ten days.

" 'The price for delivering said timber to be \$1.50 per M.

" 'Said timber to be received in sufficient water alongside of boat, either in rafts or cribs, and to be delivered at Sault Ste. Marie on dock as far away from the boat as the boom will reach; you to care for the timber as soon as it is cast from the boom.'

"The first notice that timber was ready for transportation, and the first call for the vessel was given and made by the charterer August 18, 1908, as appears from the following telegram, addressed to William Wilson:

" 'We chartered steamer Mathew Wilson some time ago, Chassell to Soo, Michigan. Haul timber. No word since. Want to know at once when we can expect it. Three loads ready. Wire answer.'

"In response to this call, the vessel arrived at Chassell on Thursday, September 3rd. After the hold was filled with certain lumber destined to Muskegon, which the vessel was at the time also engaged in transporting, they proceeded on Friday, September 4th, in the afternoon to load the hemlock timbers on the deck of the vessel. The notice of August 18th stated that the charterer had 'three loads ready' yet because of the close inspection made

by the representative of the government as the timbers were being put aboard the vessel, and perhaps from some other causes not important, it resulted that there were only about 153,000 feet of timber then actually at Chassell ready for transportation. The timbers were put aboard Friday afternoon, Saturday and Sunday morning up to 9 o'clock. A short time thereafter, and without demanding any additional timber to complete the cargo, the vessel sailed for the Sault."

The claim of the vessel there was that when first called by the libelant and notified that three loads of lumber were ready, it responded, and on arrival at Chassell found only a small portion of that amount ready, and because the libelant failed to furnish sufficient timber it was compelled to sail with a short cargo, and was therefore relieved from further performance under the charter. The court, however, held against that claim, and sustained the libel for damages, just as the court below did in the case before us.

Originally ships were held liable *in rem* under contracts of affreightment which were purely executory, but that rule was at an early day so modified in this country as to hold them so bound only after actually entering upon the performance of the contract. *The Ira Chaffee*, 2 Fed. 401; *The Monte A.*, 12 Fed. 331; *The J. F. Warner*, 22 Fed. 342; *The Director*, 26 Fed. 708; *The Starlight*, 42 Fed. 167; *The Oscoda*, 66 Fed. 347; *The Eugene*, 83 Fed. 222; *id.*, 87 Fed. 1001 (decision by this

court); *The Oceano*, 148 Fed. 131. See, also, *The Margaretha*, 167 Fed. 794; *Wilson, et al. vs. Peninsula Bark & Lumber Co.*, 188 Fed. 52; *The Helios* 108 Fed. 279.

The decision of the Circuit Court of Appeals of the First Circuit in the case of *The S. L. Watson*, and *The Thomas P. Sheldon*, 118 Fed. 945, is far from holding that a maritime lien does not lie against a ship for the breach of a contract where she has entered upon the performance thereof and performed it only in part. That such is not the doctrine of that decision is very clearly shown by the statement made by the court (page 953) that it "might have reached the same conclusion by accepting that" of this court in the *Eugene* case above cited.

In the *Watson* and *Sheldon* cases the owner of the barges contracted that they should transport five cargoes of coal from Lambert's Point in Norfolk, Va., to Providence, R. I., at 80 cents per ton. It was stipulated that the barges should "take turns in loading, as customary," and that in case coal was not ready to load them when they reported for cargo, within a reasonable time, the owners should have the option of loading on other coal, and returning next trip to load under the charter. One cargo was loaded on each of the barges, was transported and properly delivered, but neither barge took on any portion of the cargo for which a lien *in rem* was claimed against them. The court held that so

far as the three remaining cargoes were concerned the contract was purely executory—saying:

“It has now become a settled practice, where several vessels make up a line, for the managers to make contracts that goods shall go forward by one or any other of the vessels of the line, depending on the times of arrival and other contingencies. It seems an extraordinary position, heretofore unheard of, that all the vessels of such a line can be held *in solido* for the breach of such contracts so far as executory, even if parts of the cargoes contracted for had been sent forward. Yet this is necessarily the fundamental principle underlying the position of the libellant in the cases before us. To permit liens to be sustained as claimed by it *in solido* against sundry vessels, would be to go entirely beyond the purpose of the admiralty law in granting them.

“The several vessels of a supposed line, and in this particular case, by analogy, the barges, so far as voyages not completed are concerned, are in no fault. The latter never entered into any contract, either expressly or by implication; but they well and truly performed such voyages as their owner directed them to perform. They should not be held liable for breaches of duty of merely their owners.

* * * To permit liens such as are now claimed would go beyond the necessities of the admiralty law, would extend liens in violation of the principles stated by Mr. Justice Curtis in *The Kiersage*, and would assess damages against a vessel not a party to a contract for a particular voyage either directly or

by partial execution of that voyage. As to the latter proposition, we may well add that while, so far as the charterer and the owner of the barges were concerned, the charter was continuous, yet the vessels, being inanimate, could not, by the very nature of things, enter into a strictly executory contract. Each of them could be subjected to such duties only as might arise by implication of law from the circumstances of a voyage, or other concrete act, on which it had in fact entered; and therefore, as to them, each of the several voyages was logically independent and single."

True it is that the lien of the ship on the cargo for freight and expenses in connection with its carriage, and the lien of the cargo on the ship for its safe carriage and delivery, are very generally reciprocal, but in the nature of things such reciprocity does not and cannot exist in every case. This illustration of that fact is given by the appellee: "All agreements for the carriage of *persons* or property by vessels are contracts of affreightment." Benedict, 4th Ed., Secs. 199, 201. Yet where a passenger takes passage on a vessel and the vessel receives him on board and commences the voyage, but fails to complete it, she is liable *in rem* for her failure. Obviously in such cases such reciprocity does not exist, for there can be no lien on the passenger. The cases of *The Eugene*, 83 Fed. 222, and *Stone, et al. vs. The Relampago*, Fed. Cas. No. 13,486, 23 Fed. Cas. p. 158, and other cases there mentioned, are illustrations.

We have given very careful consideration to the arguments and the evidence regarding the refusal of the ship to take on her deck the 308,441 additional feet of lumber and carry it in accordance with her contract, and are of the opinion that we would not be justified in interfering with the finding and conclusion of the trial court respecting that matter. So, too, do we think we are concluded by the findings and conclusions of the learned judge upon the question of damages. To review the record upon the subject in detail would serve no useful purpose.

The judgment is affirmed.

SEP 5

W. H. ST

IN THE
Supreme Court of the United States

No. 129 of October Term, 1922

OSAKA SHOSHEN KAISHA, a corporation, CLAIMANT OF THE
JAPANESE STEAMSHIP "SAIGON MARU," HER TACKLE,
APPAREL, ETC., and UNITED STATES FIDELITY
COMPANY, a corporation,
Petitioners,

v.

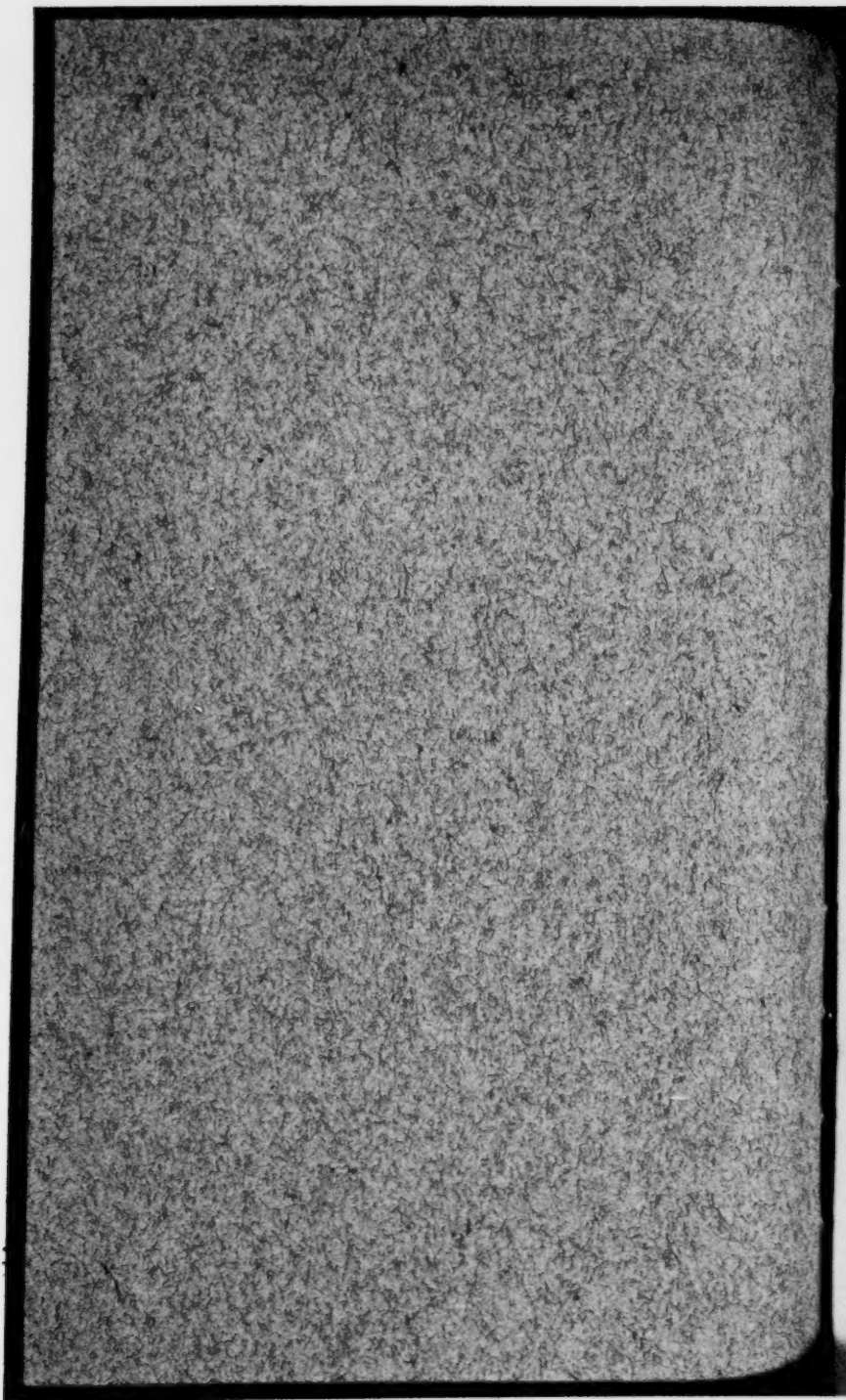
PACIFIC EXPORT LUMBER COMPANY, a corporation,
Respondent.

Brief of Respondent

*On Writ of Certiorari to the Circuit Court of Appeals
for the Ninth Circuit.*

ERSKINE WOOD,
Proctor for Respondent.

FRANK A. HUFFER,
WILLIAM H. HAYDEN,
GERALD H. BUCEY,
Proctors for Petitioners.



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In the
Supreme Court of the United States
No. 129 of October Term, 1922

OSAKA SHOSEN KAISHA, a corporation, CLAIMANT
OF THE JAPANESE STEAMSHIP "SAIGON MARU,"
HER TACKLE, APPAREL, ETC., and UNITED
STATES FIDELITY COMPANY,
a corporation,
Petitioners,

v.

PACIFIC EXPORT LUMBER COMPANY, a corporation,
Respondent.

Brief of Respondent

*On Writ of Certiorari to the Circuit Court of
Appeals for the Ninth Circuit.*

STATEMENT

The concisest possible statement of this case is
this:

Respondent sold a cargo of lumber to Gillanders,
Arbuthnot & Company, of Bombay, and chartered
the SAIGON MARU to carry it from Portland to
Bombay.

The SAIGON MARU, though obligated by the
charter party to take a full cargo, including deck
load, took on a part cargo but refused to carry a
full deck load.

Respondent libeled the ship for this breach of the charter, claiming as damages—1st, its loss of profits on the sale to Gillanders, and, 2nd, the amount it owed Gillanders as damages for not delivering a full cargo.

The District Court gave a decree for respondent, which was affirmed on appeal and petitioners now bring the case here on writ of certiorari.

The petitioners now urge 'three main points:

First. That respondent has mistaken its remedy in proceeding against the Saigon *in rem*, since, so petitioners say, there is no maritime lien on the ship for failure to take a full deck load.

Second. That she did take a full deck load.

Third. That the measure of damages adopted by the courts below was wrong.

The first and third points raise interesting questions of law, and will be discussed. The second is a question of fact as to which petitioners are concluded, unless the decision was clearly against the weight of the evidence. As it was not, this point will not require much discussion.

In the opening paragraph of petitioner's brief counsel say that the lumber which the SAIGON MARU left behind was not in existence—had not been sawn by the mill. And it is true the opinion of the circuit court of appeals so states. The point is not, in our view, material, and has never been argued. We doubt, however, the correctness of

the statement, and ask counsel to point out the evidence to support it. The mill was cutting out this cargo for the ship. Presumably it would, in its cutting, keep well ahead of the ship's loading of the lumber, so as to avoid the possibility of delaying the ship by failing to have ample lumber alongside. In these days of the war, ships were so valuable that a day's delay meant several thousands of dollars. It is not likely that the mill would risk that. It is more probable that the lumber, or most of it, *was* cut and waiting for the ship to take it. This is in part borne out by the testimony of Genereaux, Ap., p. 132, that after the Japanese captain had refused to take any more deckload, the marine surveyors asked permission to swing the four cargo booms out and *hang a sling load of lumber on the end of each boom* to test the stability of the ship. Some lumber must have been alongside then or the surveyors would not have made this request. They could not have referred to lumber already loaded, for that would have been lashed into the deckload. I do not wish to labor this point, for I do not regard it as important, but do not care to let counsel's statement pass unchallenged.

ARGUMENT

THERE IS A LIEN ON THE SHIP ENFORCEABLE IN A SUIT IN REM.

1st, Under the General Maritime Law.

The SAIGON MARU took on board 2,436,851 feet of lumber under deck and 241,559 feet on deck, at which time the captain refused to take any more and sawed off the stanchions placed to hold the deck load, thus making the loading of any more impossible.

Our contention is that the moment a ship enters upon the performance of her charter by taking even a small part of the cargo on board, she binds herself to the performance of her contract just as if she were a living being; that her taking on part of the cargo is her signature to the contract, so that whereas prior to that act, only her owner was liable in personam, after that act she herself becomes liable in rem; in other words, a maritime lien in favor of the charter has arisen against her.

Our opponents, building up their case on the maxim that the ship is bound to the cargo and the cargo to the ship, say that it is impossible there should be a lien on the Saigon for leaving part of the lumber behind, because the ship had no lien on this left-behind cargo, and that unless there is such reciprocity of liens there can be no lien at all.

The point is an interesting one that has never been passed upon by this court, though we think

the current of authority as it may be followed through the history of maritime law is in our favor.

We propose now to trace that current.

The Consolato de la Mer says, in Chapter 209:

“Every agreement which a managing owner of a ship or vessel shall make or shall have made with merchants or with his mariners, or with others who are connected with the ship or vessel, it is incumbent that he observe it without any dispute. And if by chance the said managing owner of the ship or vessel shall not be willing to observe that agreement or promise, he is bound to make good all the loss which the above mentioned parties shall sustain, or shall have sustained, or expect to sustain, without any dispute, *even if the said ship or vessel shall have to be sold.*”

Note that this would include selling the shares of the other owners to make good the agreements made by the *managing owner*, on behalf of the *ship*.

This comes within the definition of a maritime lien as given by Benedict, 4th Ed. Sec. 131, where he says:

“The maritime lien is an appropriation of the ship as a security for a debt or claim, such appropriation being made by the law; the law creates a remedy for the claim against the ship herself and rests in the creditor a special prop-

erty in her, which subsists from the moment the debt arises, and follows the ship into the hands of an innocent purchaser. Pothier describes a hypothecation to be 'the right which a creditor has in a thing of another, which right consists in the power to cause that thing to be sold, in order to have the debt paid out of the price.' "

The marine ordinances of Louis XIV, in the part headed Maritime Contracts, say, in Section XI of Title First:

"The ship, rigging and tackle, and the freight and goods laded, shall be respectively affected (affectée, bound) by the conventions of the charter party."

It is true that Mr. Justice Grier, in THE YANKEE BLADE, 19 How. 82, 15 L. ed. 554, says that this only refers to an executed contract, but certainly the language leaves this doubtful.

(I cannot find in the Role d'Oleron, The Laws of Wisbuy or The Laws of the Hanseatic League any specific reference to this point.)

I have cited these instances of the old Continental Codes as being of interest since those codes form the source of so much of our own admiralty law today. But of course I recognize that where our own courts have made distinct departures from that law, the decisions of our own courts are the final rule and must be followed. And I concede that the old continental maritime law, that a ship was liable

for breach of an executory contract of affreightment, has been modified in this country to the extent that she is no longer liable in rem when the contract remains wholly executory. But, I contend, that is the extent of the modification; and where a ship partly executes the contract, as by taking on part of her cargo, she herself is liable for all breaches of the contract. My argument on this point may be summarized thus:

1. Under the old Continental Codes ships were liable in rem for breaches of contracts made by the managing owner on their behalf, including executory contracts of affreightment.

2. Even if this were not true such was certainly the law of this country as announced in the earlier decisions of our admiralty courts, up to time of *THE FREEMAN*, 18 How. 182, 15 L. ed. 341, and *THE YANKEE BLADE*, *supra*,—1856.

3. *THE YANKEE BLADE* and *THE FREEMAN* did not really settle the point, but they did contain dicta that a vessel was not liable for breach of a contract of affreightment which was purely executory.

4. In deference to this dicta of the Supreme Court the lower courts have decided that purely executory contracts do not bind the vessel.

5. But this is the limit of the extent to which the old law has been modified, and the lower courts, as if jealous to preserve that old law, in so far as the Supreme Court dicta will allow, have many

times held that where the vessel partly executes the contract as by taking on part of the cargo, she herself becomes liable in rem for all breaches of the contract.

6. The statement by counsel that the liens must be reciprocal, that the ship is bound to the cargo and the cargo to the ship, relates to the case where the cargo has been delivered to the ship, and is true so far as it goes. But it in no way contradicts the theory that the lien on the ship *may go further*. It is in no way inconsistent with the theory that she is liable for breaches of her *partly executed* contracts, even where she has no corresponding lien in return. There are many cases of liens on ships with no reciprocal lien in their favor. As witness breach of her contract to carry a passenger.

I will now trace the cases in this country showing the law to be as I have stated it. It will appear that in the early cases the most eminent admiralty judges we then had held the ship liable in rem for breach of contracts of affreightment, without regard to whether they were executed or executory.

Judge Ware so held in the *REBECCA*, decided in 1831, Ware's Reports, Second Edition, page 187. This was a leading case and long looked upon as one of the very highest authorities. Judge Ware again so held in the *PARAGON*, decided in 1836, Federal Case No. 10708. Both of these were cases where goods were actually shipped, but the decisions were not put on that ground, but on the ground that the

ship was liable in rem for every contract made by her master for her benefit.

Mr. Justice Storey, in the Schooner *TRIBUNE*, 3 Summer's Reports, page 144, decided in 1837, laid down the same rule, although he appears to have been influenced by the fact that a part of the cargo had been placed on board. He says at page 149:

"A cargo for this part of the voyage was actually taken on board, and the voyage was voluntarily broken up at Frankfort by the claimants. Under these circumstances, it seems to me that the jurisdiction did attach, as the voyage was maritime, and the contract was maritime."

In the *FLASH*, decided in 1847 by Judge Betts, Abbott's Admiralty Reports, Vol. 1, page 67, the contract was to carry a cargo of bricks. The *FLASH* took on a portion of the cargo but refused to take on the rest and Judge Betts held her in rem, basing his decision, however, not alone on the fact that she had taken on a part of the cargo, but on the broader ground that a vessel is liable in rem for all contracts made for her benefit by her master in the scope of his authority.

In the *PACIFIC*, 1 Blatchford, page 569, decided in 1850, Mr. Justice Nelson on circuit held the ship liable in rem for a purely executory contract.

These cases were all before this court had decided the Schooner *FREEMAN*, 1855, and the *YANKEE BLADE*, 1856, in which this court, in

language which has been criticised by some very able judges as mere dicta, said that a vessel could not be liable in rem for breach of an executory contract. Among the criticisms of these dicta is that of Judge Lowell of Massachusetts who, in 1872, decided the case of *Oakes v. Richardson*, Lowell's decisions, Vol. II, page 173. He said at page 176:

"The respondent contends that the jurisdiction does not attach until the goods have been shipped. The opinion in *Rich v. Parrott*, which he cites, contains no more than the intimation of a doubt, created by some more recent remarks in *Schooner Freeman v. Buckingham*, 18 How. 182, and *Vandewater v. Mills* (The Yankee Blade), 19 How. 82. In the former of these cases, there is a dictum (p. 188) that the law creates no lien on a vessel as security for the performance of a contract to deliver cargo until some lawful contract of affreightment is made and a cargo is shipped under it, and in the latter case that remark is quoted and called a decision of the court; and a like rule concerning the privilege against vessels is cited from *Boulay Paty* (19 How. 91), but I do not understand the point to be decided in either of these cases; because in the one the controlling situation was that no valid contract of affreightment had been made, the master having signed a bill of lading for goods that had never been on board his vessel, a fact which went quite beyond any question of

lien; and in the other case the contract was held to be one of partnership and not of affreightment, and for that reason to be out of the sphere of admiralty."

Notwithstanding the indecisive character of the remarks of the Supreme Court in the Schooner FREEMAN and the YANKEE BLADE, the lower courts have, with a single exception, followed the language in these cases and have held that breach of a contract of affreightment *wholly* executory creates no lien on the ship. The single exception is the case of the WILLIAMS, referred to in a moment; but while the lower courts, in deference to the Supreme Court, have receded from the advanced ground taken by the early cases, until it has now become practically settled in the maritime practice in this country that *executory* contracts are not enforcable in rem, still it has become equally well settled that the moment a ship enters upon the performance of the contract by taking a portion of the cargo aboard, or doing any other act which signifies her acceptance of the contract, she herself is bound to its performance and is liable in rem for its breach.

This rule has been announced in many cases and has become so definitely recognized that in many cases in the reports ships have been libelled in rem after taking a part of the cargo on board for refusal to take the balance, and the question of the liability of the ship has not even been seriously disputed.

The history of the decisions which I have attempted to give would not be complete without a mention of the WILLIAMS, decided in 1873 by Judge Emmons, in the eastern district of Michigan, 1 Brown's Admiralty Reports, page 208. A tug had been engaged to go to the assistance of the WILLIAMS to get her off where she had stranded, and before the tug arrived at the spot the WILLIAMS had got off. The tug libelled the WILLIAMS in rem for her compensation. Your Honors will note that the contract was partly performed by the tug going to the spot where the WILLIAMS had been. Judge Emmons, however, did not base his decision on that ground, but on the old and broader ground that the ship was liable in rem for all contracts made on her behalf. The opinion is elaborate and shows an exhaustive search of the authorities, and the proctor who contended for the liability in rem was Mr. H. B. Brown, afterwards associate justice of this Court. I have put the WILLIAMS in this brief slightly out of its chronological order because it is the only case which, after the Supreme Court decisions referred to, still adheres to the older doctrine of the earlier cases, and therefore belongs in the category of those cases.

Reverting now to the chronological order, the first case which followed these Supreme Court decisions is that of the

HERMITAGE decided in 1860 by Mr. Justice Nelson while on circuit, 4 Blatchford, 474. The

case was one of an executed contract. The Hermitage had taken on board and carried the cargo and libelled the cargo for freight. Mr. Justice Nelson in deference to the Supreme Court dicta reversed his own earlier holding in the Pacific and said that a purely executory contract would not be enforceable in rem, but he indicated clearly enough that where the ship had entered on the performance of the contract, as by taking a part of the cargo on board, she would be liable. He opens his opinion thus:

“This case does not fall within that class of cases where nothing has been done under the charter of the vessel, that is, where no goods have been placed on board, and the voyage has not been entered upon; in which cases there can be no lien upon the vessel or cargo under the charter party.”

The next case is that of *THE IRA CHAFFEE*, (2 Fed. Rep. 401) decided in 1880 in the eastern district of Michigan by Judge Brown, afterwards associate justice of this Court. It is cited by counsel in his brief as authority for his proposition, but we think it does not sustain it. The case was one of a purely executory contract, the engagement having been to carry a certain boiler which was never put aboard the boat nor delivered to her master. Judge Brown said:

“Whatever be the rule with regard to contracts of affreightment, which are purely executory,

it must now be considered as settled that if the ship enters upon the performance of its work, or *any step* has been taken toward such performance, the ship becomes pledged to the complete execution of the contract and may be proceeded against in rem for nonperformance."

Judge Brown did not consider the *Yankee Blade* or the *Freeman* to have definitely settled the question even as to *purely executory contracts*, for he says, on page 402:

"Prior to the decisions of the Supreme Court in the case of the *Freeman* * * * and the *Yankee Blade* * * * the question of jurisdiction in the cases of executory agreements was unsettled, and even these cases cannot be said to have definitely fixed the measure of liability. They seem rather to have announced in general terms a doctrine from which the Supreme Court has not as yet shown any disposition to recede."

Note that while Judge Brown considers the question of executory contracts as still not definitely settled, yet he considers cases of partly executed contracts, as where the ship has taken "any step" towards the performance as being definitely settled. in favor of a lien against the ship.

In *The MONTE A*, 12 Fed. Rep. 331, decided by Judge Brown of the southern district of New York

in 1882, which was a case of a wholly executory charter party, it is said:

“The action in this case is brought for the breach of a contract of charter party wholly executory. The vessel never entered upon the performance of the contract *or any part of it*. In such cases it has been repeatedly declared by the Supreme Court that no lien exists upon the vessel.” Citing *The Freeman*, *The Yankee Blade*, and *The Keokuk*, 9 Wallace, 517.

In the *J. F. WARNER*, 22 Fed. Rep. 342, decided in 1883, Judge Brown, referring to his earlier decision in *Scott v. The Ira Chaffee*, said: (pp. 344-345.)

“I had occasion to hold that the owner of a cargo had no lien upon the vessel for the breach of a contract of affreightment until the cargo or *some portion* has been laden on board or delivered to the master.”

In *THE DIRECTOR*, 26 Fed. Rep. 708, decided by Judge Deady in 1886, it is said at page 710:

“But it must be understood that the vessel is not liable for a breach of a contract of affreightment so long as it is wholly executory, though the master and owner are. *The Ira Chaffee*, 2 Fed. Rep. 401. *But as soon as a performance of the contract has commenced a lien exists on the vessel in favor of the shipper or charterer,*

and a suit in rem may be maintained against the same for any liability of the master or owner arising on or growing out of said contract."

In *THE MISSOURI*, 30 Fed. Rep. 384, decided by Judge Coxe in 1887 in the northern district of New York, exceptions to the libel were sustained because

"the voyage was not undertaken, and *no part* of the cargo was placed on board."

In *THE GUILIO*, 34 Fed. Rep. 909, decided in 1888, the libel was against the Guilio for delay in proceeding to her destination and for not taking on board a *full cargo*. The case was before Judge Brown of the southern district of New York, and yet the opinion does not even suggest that a libel in rem would not lie in a case of this kind.

In *THE STARLIGHT*, 42 Fed. Rep. 167, decided in 1890 by Judge Pardee on appeal to the Circuit Court from the District Court of Florida, we have a case identical in all respects with the case at bar. The ship was chartered to carry a full and complete cargo of lumber, and after taking on a portion of the cargo sailed away without a full cargo. The shipper libelled her in rem for her failure to carry a full cargo and obtained a decree. It does not appear from the opinion whether the precise point now before the court was raised in that case. If it was not raised the case is still good authority as showing that it has become the settled understand-

ing of shippers, the bench and the bar, that where a ship has entered on the performance of her contract by taking on a portion of her cargo, she is liable in rem for her refusal to carry the balance of the cargo. It is this settled understanding, usage, custom, or whatever you are pleased to call it, indulged in by ships, shippers, proctors and judges, which really goes to make up maritime law.

In *THE OSCODA*, 66 Fed. Rep. 347, decided in 1895 by Judge Coxe of the northern district of New York, it is said:

"The libellant seeks to enforce a lien upon the Propellor *OSCODA* for damages occasioned by the breach of a *partly executed* contract of towage. The exceptions dispute the jurisdiction of the court. I am of the opinion that the Propellor, having entered upon the agreement to tow libellant's barge during the entire season of 1894, is answerable in rem for the breach of the agreement by the abandonment of the barge in September."

In *THE EUGENE*, 83 Fed. Rep. 222, decided by Judge Hanford in the northern district of Washington in 1897, which was a suit in rem for breach of an executory contract to carry passengers, after a review of the authorities on exceptions to the libel, Judge Hanford, at page 224, used this language:

"These authorities are conclusive upon the point that the right to proceed in rem for breach of a

contract of affreightment does not exist unless the cargo, *or a portion of it*, has been delivered to the master of the vessel, or to his authorized agent."

This was affirmed by the Circuit Court of Appeals, 87 Fed. Rep. 1001.

THE HELIOS, 108 Fed. Rep. 279, decided by Judge Thomas of the eastern district of New York in 1901, was a suit in rem against The Helios for breach of charter. She had been engaged to go to the West Indies and take on board the cargo of a wrecked vessel. She proceeded to the wreck and after taking on a portion of the cargo steamed away leaving the balance still lying in the wreck. She was held liable in rem.

THE OCEANO, 148 Fed. Rep. 131, decided by Judge Hough of the southern district of New York in 1906, was a case where a charterer had through an error made an over-payment of charter hire and sued the ship in rem to get it back. The jurisdiction was disputed. The court said on page 133:

"As soon as the performance of a charter party has commenced a lien exists on the vessel in favor of the shipper or charterer, and a suit in rem may be maintained for any liability of the master or owner arising therefrom."

The MARGARETHA, 167 Fed. Rep. 794, decided in 1909 by the Circuit Court of Appeals for the sec-

ond circuit, Judge Ward writing the opinion, was a case of a wholly executory contract. The court said:

"The charter party *not having been entered upon* there was no right against the steamship in rem." Citing the *Monte A.*

Wilson et al v. Peninsula Bark & Lumber Company, 188 Fed. Rep. 52, decided by the Circuit Court of Appeals of the sixth circuit in 1911, Judge McCall writing the opinion, was a libel against the steamer MATTHEW WILSON and her owners for failure to carry a full cargo of lumber. The jurisdiction in rem was not even questioned.

In all these authorities one general doctrine appears, and that is that whatever the rule may be as to contracts wholly executory it is now settled that where a ship enters on the performance of a contract by doing any act which shows that she herself, as a living sentient being, accepts the contract and undertakes to perform it, as where she takes on a portion of the cargo, she herself becomes bound to its performance.

Against all the authorities which I have cited counsel cites really only one case, that of *The SHELDON* and *The WATSON*, which seems to need comment from me; for I do not consider the Supreme Court cases any more authority for his proposition than for mine. All that the Supreme Court cases say is that a lien will not lie for a purely executory contract, and none of them say that it will not lie for a partly executed contract. And so we come

to a discussion of *The Sheldon* and *The Watson*; and the moment the facts in these cases are understood their authority to support counsel's proposition disappears, for they were cases where the libel attempted to bind the various ships of a line *in solido* for breach of a contract of affreightment to carry goods by that line,—a position in admiralty law which the Circuit Court of Appeals truly characterizes as “extraordinary” and “heretofore unheard of.” The facts in these cases were that *The Sheldon* and *The Watson*, two barges, had been chartered to make five voyages carrying coal, and each barge did make one voyage and then refused to make the others. They were to load in turn and apparently it made no difference to the shipper which barge loaded first so long as the cargo was carried. The Circuit Court of Appeals pointed out that it would be an absurd proposition to hold a vessel liable for failure to make a voyage upon which she had never entered because that would be contrary to the theory of the maritime law that the vessel as a living thing does not sign her name to the contract until she commences the voyage. A vessel, as such, is deemed to make the contract herself when she enters on its performance and she obviously, therefore, cannot make a contract for a future voyage. The Circuit Court of Appeal, 118 Fed. Rep. at page 952, used this language:

“It has now become a settled practice, where several vessels make up a line, for the managers

to make contracts that the goods shall go forward by one or any other of the vessels of the line, depending on the times of arrival and other contingencies. It seems an extraordinary position, heretofore unheard of, that all the vessels of such a line can be held in solido for the breach of such contracts so far as executory, even if parts of the cargoes contracted for had been sent forward. Yet this is necessarily the fundamental principle underlying the position of the libellant in the cases before us. To permit liens to be sustained as claimed by it in solido against sundry vessels, would be to go entirely beyond the purpose of the admiralty law in granting them.

"The several vessels of a supposed line, and in this particular case, by analogy, the barges, so far as *voyages* not completed are concerned, are in no fault. The latter never entered into any contract, either expressly or by implication; but they well and truly performed such *voyages* as their owner directed them to perform. They should not be held liable for breaches of duty of merely their owners." * * *

And at the bottom of page 953, continuing, said:

" * * * to permit liens such as are now claimed would go beyond the necessities of the admiralty law, would extend liens in violation of the principles stated by Mr. Justice Curtis in *The Kiersage*, and would assess damages against a ves-

sel not a party to a contract for a particular *voyage* either directly or *by partial* execution of that voyage. As to the latter proposition we may well add that while, so far as the charterer and the owner of the barges were concerned, the charter was continuous, yet the vessels being inanimate, *could not*, by the very nature of things, enter into a strictly executory contract. Each of them could be subjected to such duties only as might arise by implication of law *from the circumstances of a voyage*, or other concrete act, on which *it had in fact entered*; and therefore, as to them, each of the several *voyages* was logically independent and single."

It is perfectly apparent that the court here truly expressed the fundamental principle of the admiralty and maritime law that the vessel is herself a contractor from the moment she enters upon a voyage. She is treated as if she were a living thing who, by taking on board a portion of the cargo, has signed a contract to make the specified voyage; but obviously she cannot be held to have obligated herself for future voyages because she cannot, until each of these future voyages actually commences, do any possible act which will show her intention so to obligate herself. The voyage is the unit, so to speak, of the ship's activities. This has been the natural development from the early days of commerce when the voyage marked the completion and end of one employment of the ship.

She was a wanderer over the face of the earth looking for merchandise to carry and when she finished one voyage she looked around afresh for new employment and commenced a new venture. A modern time charter for a series of voyages is a modern development and has not changed the fundamental conception of the law when each voyage marked a separate unit in the ship's career. It is this conception, and also the fact that the ship cannot by any visible act show she binds herself to future voyages which led to the decision in *The Sheldon* and *The Watson* that the barges were not liable for failure to make unperformed voyages. But can there be any doubt as to what the holding would have been had the contract been for one voyage on which the barge had entered by taking on a portion of the cargo?

Stress is laid by counsel on the reciprocity between the liens of the cargo on the ship and the ship on the cargo. This is undoubtedly true to a certain extent, but it is only a statement of the old continental rule that the ship is bound to the merchandise and the merchandise to the ship, meaning that the ship has a lien on the cargo for freight and expenses connected with the safe carriage of the cargo, and the cargo has a lien on the ship for its safe carriage and delivery. This, however, is not at all inconsistent with the idea that the ship always is bound to the performance of a contract upon which she has herself entered, even in some cases where she might not have a lien at all. For

example, "All agreements for the carriage of *persons* or property by vessels are contracts of *af-freightment*." Benedict, 4th Ed. §§ 199, 201. Yet where a passenger takes passage on a vessel and the vessel receives him on board and commences the voyage but fails to complete it, she is liable in rem for her failure. Obviously here is a case where there can be no reciprocal lien, for there can be no lien on the passenger. Such cases are well known; one is the *The Eugene*, 83 Fed. Rep. 222, and another is *Stone v. The Relanpago*, Federal case 13,486. It is true in the latter case mention is made of the ship's having a lien on the passenger's baggage; but suppose there had been no baggage!

It is to be noted, moreover, in considering this reciprocal relation of liens that the lien of a vessel on her cargo is of an entirely different nature and origin from the lien of the cargo on the vessel. The lien of the cargo on the vessel is of a higher order. It is a *jus in re* and follows the ship into whosoever hands the ship goes. The lien on the cargo, upon the other hand, is not a *jus in re* but a mere possessory lien and is lost the moment the cargo leaves her possession. The lien of the cargo is nothing more than the right to hold the goods until the freight is paid. 1 Ruling Case Law, page 456, being Section 56 of the article on admiralty.

It may be remarked here in passing that the lack of reciprocity of which petitioners complain does not, as a matter of fact, exist in this case.

That lack is supplied by the charter party itself which says, in clause N, "the vessel is to have a lien on cargo for all freight, *dead freight* and demurrage" Ap. 981. I do not for a moment think our position needs the support of this clause. I am convinced we have the lien without it. Certainly we should have it with it.

Counsel argues, at the bottom of page 55 of his brief, that if the decisions of the courts below in this case are allowed to stand, there will be no definite rule by which it can be determined in any given case whether or not a lien exists, and vessels will be subject to secret maritime liens "based upon occurrences not appearing to have any connection therewith." It is hardly necessary to point out that where a vessel enters upon the performance of her contract of affreightment by actually taking on a portion of her cargo, she has signified by as definite and conspicuous an act as it is possible for her to perform that she is undertaking a contract and is herself bound for its performance. You could hardly have a more definite rule or test than that. And the lien arising would be no more "secret" than a lien for seamen's wages, salvage, general average, collision, materials, supplies, repairs, necessities, bottomry loans, pilotage, wharfage, or any other of the liens which a ship's activities may give rise to.

It would surely be a great miscarriage of justice to allow this Saigon Maru, after deliberately refus-

ing to receive part of the cargo, to then say that we had no lien on her because she had no lien on that part of the cargo which she herself had wrongfully refused. This would be to permit her to profit by her own wrong. Can it be supposed that a ship could part with her lien on her cargo by surrendering its possession and then when sued for damages to the cargo say, "I have no lien on the cargo and consequently you have no lien on me." The Saigon Maru here is making a contention which is equivalent to this, or worse; she says, "By my own act I refused to take this portion of the cargo, consequently I prevented myself from getting a lien on it, therefore you have no lien on me." A more utter failure of justice could hardly be imagined.

But, says counsel, a ship profits by her own wrong when she refuses to take any cargo at all, for here admittedly she cannot be sued in rem. True; she does. But that is no reason for making a bad matter worse, and extending the rule any further. Besides, where she has taken no cargo the charterer still has his cargo intact, and in normal times can usually fix another ship to take it. But he cannot do this when he has loaded most of his cargo and been drawn into the transaction so far he cannot get out, and then the ship leaves the rest of the cargo behind.

Admiralty law is made up of the "usages and customs of the sea," as announced by learned writers and interpreted and modified by our courts.

By the usages and customs of the sea, as found in the old codes, and by the decisions of our courts, the respondent has this lien in this case, and not only those cases where the point has been expressly adjudicated, but also those quite numerous cases where the lien has been taken for granted, are evidence of the accepted law.

The Lien Under the Oregon Statute.

Basing our case, as we do principally upon the general maritime law, we do not propose to devote much space to this portion of the brief, but merely to comment on counsel's contention as shortly as possible.

this Court in *Southern Pacific Company v. Jensen*,

We concede at the outset that the decisions of 244 U. S. 205, 37 Sup. Ct. Rep. 524, and *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. Rep. 438, declaring for uniformity in maritime law, weaken the case for a lien under the Oregon statute. But that is as far as our concession goes, and before applying to this case the doctrine of those cases, resting as they do on a different state of facts, we must have a direct decision of this Court telling us to do so. We can see no more reason for denying the lien under the state statute in this case, on the ground of lack of uniformity, than for denying it in those quite numerous death cases where the state statutes have been invoked to give a lien where the maritime law gave none.

Counsel's first contention is that the Oregon statute applies only to domestic vessels, and the Haytien Republic, 65 Fed. Rep. 120, decided by Judge Bellinger, supports him. The statute is section 7504 of Lord's Oregon Laws and says that "every boat or vessel used in navigating the waters of this state, or constructed in this state, shall be liable and subject to a lien for all damages accruing from the non-performance * * * of any contract of affreightment." This statute has been applied in the cases of *The Aurora*, 163 Fed. Rep. 633, and 178 Fed. Rep. 567, and *The General Foy*, 175 Fed. Rep. 590. The original records in the District Court of Oregon show that *The Aurora* was a California vessel, and *The General Foy* a French vessel, and the specific point that the vessels were foreign was raised by the exceptions though it does not seem to have been discussed in the opinions.

Counsel's other contention is that the statute if applied to foreign vessels is unconstitutional; in support of which he cites *The Roanoke*. *The Roanoke* was an aggravated case. The Washington statute under consideration gave material men *three years* in which to enforce their claims against a vessel. Bear in mind that, under the maritime law, liens must be enforced at the first reasonable opportunity or be lost as against other lienors. This feature of the Washington statute may be considered a gross infringement of the general maritime law, so much so as to make it unconstitu-

tional. Furthermore, in that case the ship owner had paid in full the contractors who did the work on the vessel, which point was emphasized by the Supreme Court. In *The Roanoke* the opinion was written by Mr. Justice Brown. He himself, however, when sitting as judge in the eastern district of Michigan, had decided in *The J. F. Warner*, 22 Fed. Rep. 342, that the statute of the state of Michigan, very similar to the Oregon statute, gave a lien on a vessel for breach of an executory contract of affreightment. The *J. F. Warner* was presumably a New York vessel, since the contract was made in New York, but this is not expressly stated.

There is nothing in *The Roanoke* to show that Judge Brown had changed his view since deciding *The Warner*, and as the issues in *The Warner* appear to have been the same as those now before us, and the issues in *The Roanoke* were not, *The Warner* must be given a great deal of weight.

In the case of *THE ENERGIA*, 124 Fed. 842, decided after *The Roanoke*, Judge Hanford upheld the Washington statute which is similar to the Oregon statute and enforced the statutory lien against the foreign vessel for breach of an executory contract of affreightment.

Amount of Deckload

This is petitioners' second point. They say the *Saigon* did take a full deck load and that the courts below were wrong in saying she did not. On this

question of fact, however, they are concluded unless the decision is clearly against the weight of the evidence.

The decision so clearly has the weight of evidence with it in the testimony of Mr. Wheelwright, Mr. Rothschild, the stevedore, and Captains McNaught, Genereaux and Hoben, marine surveyors, to say nothing of the admissions of Mr. Orrett and Captains Cullum, Yamamoto and Yamaguchi, that I do not propose to argue this point. If I thought it were open to question, I would contend for larger damages than the courts below allowed; for they held us down to 550,000 feet as constituting a full deckload, whereas we believe 750,000 feet would have been nearer the mark.

A word may be appropriate here in reference to what we cannot help regarding as a curious argument of counsel. It is that no matter how grossly Captain Yamamoto erred on the quantity of the deckload, yet, since the District Judge found that he acted in good faith, his decision, as master of the vessel, is binding. Counsel's argument may be summarized thus:

1. The court did not find Captain Yamamoto incompetent.
2. The court found that he acted in good faith.
3. Any decision of the master made in good faith, no matter how unwarranted by the facts, must stand.

Our first comment is that the District Court, in language softened as much as possible out of consideration for Captain Yamamoto's feelings and reputation *did* find that he was incompetent for this voyage. Else what means a finding that he had never in his life before carried a cargo of lumber and was "*unduly timid*"?

Our second comment is that it is *not* the law and never has been that the master has an unlimited discretion in saying when his ship is fully loaded. He *has* some discretion,—I admit it freely—and when he exercises it within bounds that commend themselves as reasonable, let us admit for the sake of this point, that it is controlling, (though he shares this discretion with the marine surveyor. See Orrett's letter *Apostles* page 86.) But when he steps outside those bounds, his decision is not binding and all the "good faith" in the world cannot make it so. An *honest* mistake can be so glaring as to amount to an abuse of discretion. Suppose this man of no experience in this lumber trade, and of excessive timidity, had said that his ship would take *no* deckload, or, as he *did* say at first, a deckload of only 175,000 feet, (Ap. 88) would any court be bound by that—no matter how honest he was? Of course not. This is not a case of tort, where good faith might become a question. It is a case of contract. The ship broke her contract to carry a full deckload. That she broke it "honestly" or in "good faith" is beside the point. I may decide in the best of good faith that I have a legal right

to pursue a certain course under a contract. But if, as a matter of fact, I had no such right, my honesty and good faith will not protect me.

I would willingly let poor Captain Yamamoto rest in peace, but counsel's objection to Judge Wolverton's characterization of him as "unduly timid" forces me to a short analysis of him.

He had never carried a lumber cargo in his life before, and his lack of knowledge of how such a cargo is carried caused a timidity on his part which was at the bottom of the whole trouble in this case. He conjured up in his imagination things that *possibly* could conceivably happen, until they took on in his mind the form of probabilities or things that were to be expected, and instead of being the intrepid, resourceful seaman that he should have been to occupy the position he held, he became like a boy, frightened at his own imagination. The steering rods became to him a *probable* source of danger, although he knew nothing of the manner of securing a deckload, and all the knowledge and experience of the marine surveyors, the stevedore and Mr. Wheelwright, who had loaded thousands of deckloads from ten to fourteen feet high, some on ships with steering rods like his, meant nothing to him. He brushed it aside as if it were folly. He drew on his imagination until typhoons in the China Sea became to him an almost certainty, and he even testified that he expected to meet a "*terrible typhoon*" (i. e., the worst kind) three or four times during July (Ap. p. 723) al-

though the hydrographic chart for July, 1919, (marked twice as Claimant's Exhibit "L" and Claimant's Exhibit "I") shows that there have only been thirteen typhoons in these waters in July in *eleven years*. Yet according to the captain's "three or four times during July" there would have been in this time thirty-three to thirty-four of such storms. He ignored entirely the fact that typhoons always give twenty-four hours' notice of their approach (Ap. pp. 576, 519); that it is always possible to run from them unless you are cramped for room (Ap. p. 519); that the only place he would be cramped for room would be going through the Straits of Formosa (Ap. p. 576 and charts) which he would pass in one day (Ap. p. 575) and that he would pass through the whole typhoon area and be completely out of it in only eight days (see Claimant's Exhibit Yamamoto No. 2, where the red line marks his voyage with the noon position each day, and where Captain Cullum has marked the typhoon limits).

The southwest monsoon became to Captain Yamamoto a terribly dangerous sea (Ap. p. 721) which "must" shift his deckload against his steering rods and break them (Ap. pp. 736-737) and render his ship unstable, although the fact is that the monsoon sea is nothing more than "a little chop" as stated by Captain Hoben (Ap. p. 260) and practically agreed to by Captain Cullum (Ap. pp. 538-539) with a wind velocity of only five or six (Ap. pp. 538-539)—nothing comparable to voyages

across the Pacific in bad weather,—and notwithstanding the further fact that the voyage from Achen Head to Bombay, which is the whole of the monsoon part of the voyage, only took him thirteen days, with Colombo as a halfway port in case of necessity, so that he was, at this stage, never more than three days from a port of refuge. (See charts.)

Asked if, in the very remote contingency that anything should happen to his steering rods, he could not use his hand gear, his answer was "No," that that would be "impossible" (Ap. p. 744) and "very dangerous" and a man could not stand at the wheel in stormy weather (Ap. p. 744), notwithstanding the fact that the ships of the world all used to be steered by hand gear and they are all steered by that now in case of anything happening to the other gear. That is what the hand gear is for. Yet to Captain Yamamoto is was apparently a useless ornament. A resourceful man, a man who combined with prudence a certain amount of initiative such as we would expect from a sea captain, would have said "Yes, I could use my hand steering gear. It might be a little difficult to connect it in a very bad storm, but I could do it with the use of relieving tackles, and if necessary I could lash a couple of men to the wheel to keep them from being washed overboard." That's been done more than once, yet to Captain Yamamoto such a thing was so "very dangerous" that he could not even consider it.

He took at least two hundred tons more coal from Portland than there was any necessity for, and he actually arrived at Bombay with five hundred tons of coal in his bunkers, all of which reduced his cargo carrying capacity by that much.

His timidity had combined with it that absolute obstinacy that sometimes goes with abnormal fear and was illustrated by his refusal even to listen to Mr. Orrett, his own agent, to the protests of the libellant, to the arguments of the marine surveyors, to their requests to empty one or two ballast tanks or to lift some sling loads of lumber off the docks at the ends of the ships' booms. Nothing of this would he do and his obstinacy reached its culmination when he sawed off the stanchions and said he would not carry another stick. Conceding that a captain has some discretion as to the amount of cargo he shall carry, this captain's actions throughout amounted to an abuse of that discretion. If the man had had any experience with lumber cargoes he would have been different, but he had not.

The remarks which Judge Thomas applied to the captain of the "Helios," 108 Fed. Rep. 279, 284, can be applied with equal force to Captain Yamamoto. The "Helios" had been chartered to go to a coral reef in the West Indies and there load iron rails as they were taken out of a wreck. In the midst of the operations the captain of the "Helios" lifted anchor and steamed off with only half a cargo

because he was fearful of his anchorage ground about the reef and of possible hurricanes that would be expected in June and July. The court said:

"The conclusion cannot be escaped that the captain was timorous, rather than conservative and duly cautious; that he was too expectant of possible harm to his vessel, chartered for use on or about a coral reef, and too indifferent to the pecuniary sacrifice his departure entailed upon the libelant in the premature dissolution of the enterprise after the great expense of initiating it, and that he shut his eyes too readily and obstinately to all resources suggested to him, or of which he should have been cognizant. * * * * * Undoubtedly danger lurks in all things, yet seamen undertaking adventures in tropical regions are not expected to experience the dismay that would come to the inexperienced, but rather to be intrepid, resourceful, and helpful. The captain's consciousness of the possible, but improbable, to a degree ruined the enterprise, and so far compensation should be made."

In this same case the court said, top of page 283, that whether hurricanes were to be expected in June and July in that region or not, "in any case, the vessel was chartered for those very months, for those very waters, and that very reef," and should have done what she was chartered to do.

Applying that to the case in hand, the Saigon Maru was chartered to carry a *full* deckload of lumber for this *very* voyage to Bombay in these *very* months of June, July and August, and if there were any such dangers as Yamamoto said there were, the owners of the vessel knew of them at the time they chartered her and cannot break up the enterprise of respondent and entail heavy pecuniary loss on it by failing to carry a full deckload to the very port and in the very months that they had agreed on.

It is an interesting commentary on Captain Yamamoto's apprehensions, that the log shows an utterly calm and peaceful voyage from Portland clear to Bombay,—a monotonous voyage.

Was the Vessel Seaworthy?

In view of the finding by the courts below that the Saigon Maru did not take a full deckload, the question of her seaworthiness is probably now immaterial. But that it may not be entirely lost sight of, I will say here that the charter party warrants the vessel *seaworthy* to carry *this cargo*, including a *full deckload on this voyage*. (Ap. pp. 977-978.) And if all Captain Yamamoto says about his ship is true, she was not seaworthy and that was a breach of the charter party for which the ship is liable.

See his testimony regarding his ship's tenderness, Ap. 728, 745, 748-749, 774-775, as affected by her ballast tanks Ap. 775-777, and his testimony generally about his steering rods, Ap. 736-737, 781, and elsewhere.

THE DAMAGES.

This is petitioners' third point: They complain that the proper measure of damages was not used. By adopting the measure used in other cases, and fitting the facts in those cases, but not the facts in this case, petitioners even try to show that respondent, instead of suffering a loss by the Saigon's refusal to take the deckload, actually made a gain. They in effect tell Mr. Wheelwright, who has been exporting lumber for twenty-three years, that he doesn't know his business and can't tell a profit from a loss.

Respondent's lost profits are known to a mathematical certainty. It would lighten the labors of judges, if, in all cases, the damages were so easily ascertainable. They are shown on libelant's exhibit "L," Ap. 123, and are calculated by adding to the price paid for the lumber in Portland the cost of getting it to Bombay, and subtracting the sum of these two from the price received in Bombay. The result shows a profit of \$7.995 per thousand feet, and in consequence, a loss of this much to the respondent for every thousand feet the Saigon left behind.

But the petitioners, taking from other cases the rule that the measure of damages is the market price at port of destination at date the goods should have arrived there, less the market price at port of shipment *on same date*, plus cost of transportation from port of shipment to destination, reason thus: The sale price at Bombay, August 2nd, was \$70.275

per thousand; the market price at Portland *on same date*, plus cost of transportation, was \$78.401; hence respondent lost on each thousand feet shipped the difference between these two, or \$8.1251 (Petitioners' brief, before the Circuit Court of Appeals, pp. 203-207); or, figuring it a slightly different way, the loss per thousand feet shipped was \$4.625 (Petitioners' same brief, p. 208). Consequently the Saigon did respondent a favor by refusing to take a full deckload, and respondent showed base ingratitude by bringing this suit. Petitioners' brief, pp. 98-99.

That sounds fantastic but it actually is petitioners' position. Merely to state it is enough to discard the rule of damages for which they argue. Petitioners' error is due to their ignoring the fundamental *principle* of the law of damages. This *principle* is *due compensation*, and every *rule* for measuring damages is subordinated to this principle, and if any rule does not fulfill the principle the rule is discarded in favor of one that does. Sutherland makes this clear as follows:

"The universal and cardinal principle is that the person injured shall receive a compensation commensurate with his loss or injury and no more; and it is a right of the person who is bound to pay this compensation not to be compelled to pay more, except costs. * * * The principle of just compensation is paramount. By it all rules on the subject of compensatory damages are tested and corrected. They are but

aids and means to carry it out; and when in any instance such rules do not contribute to this end, but operate to give less or more than just compensation for actual injury, they are either abandoned as inapplicable or turned aside by an exception."

Sutherland on Damages, 4th Ed., Vol. 1, pp. 47-48.

"Doubtless it is essential, in order to bring within the contemplation of the parties damages *different from and larger in amount* than those which usually ensue, that the special circumstances out of which they naturally proceed shall have been known to the party sought to be made liable in such manner, at the time of contracting, as to make it manifest to him that if compensation in case of a breach on his part is accorded for actual loss, it must be for a loss resulting from that special state of things which those circumstances portended. Damages are not the primary purpose of contracts, but are given by law in place of and as a compensation and equivalent for something else which had been agreed to be done and has not been done. What the damages would ordinarily be on such a default is immaterial if the contracting party assumed the obligation he has broken with a knowledge of a peculiar state of facts connected with the contract which indicate that other damages would result from a breach, and the latter

are claimed. To confine the injured party's recovery in such case to the *lighter* damages which usually follow such a breach, where no such known special facts exist, and exclude those which were thus brought within the contemplation of the parties, would be to sacrifice substantial rights to arbitrary rule; to set aside the principle which entitles a party to compensation commensurate with his injury to give effect to a rule formulated to render that principle effectual; it would be to apply a subordinate rule where it has no application instead of the principle which is paramount and always applicable. What are the usual damages which result from the breach of a contract? *There is certainly no customary amount, nor is there any rule of damages which is universal like the principle for allowance of due compensation.* If it is a contract of sale and the vendor refuses to complete it, one rule is to ascertain that compensation by the difference between the contract price and the market value, because if the article which is the subject of the contract can be obtained in market at a market price the vendee is thereby enabled to supply himself without loss unless the price has increased. That rule goes no further, but the principle does. Where the vendee cannot obtain the article in the market, nor at all if the vendor refuses to perform his contract, that rule is not applicable, and then resort must be had to other elements

of value; and recourse is had to the principle to determine the measure of redress; *even a contract of resale made by the vendee and of which the vendor had no notice may be considered.*"

Sutherland on Damages, 4th Ed. Vol. 1, pp. 202-204.

The above quotations make it amply clear that the *principle* of just compensation is the paramount thing, and that all *rules* for measuring damages are subordinate to it and give way when they do not do justice.

Indeed the quotation from Judge Taft's decision in *The Oregon*, 55 Fed. 666, on page 92 of petitioners' brief, states the principle concisely:

"The pecuniary difference between the shippers' condition with the contract performed and his condition if the merchandise is not shipped, but remains at the port of shipment, is * * * * his legal damage."

In this case the owners of the *Saigon Maru* sold the respondent "space" in the vessel. They sold "transportation," just like any other commodity. If there had been any market price for "space," if vessels had been abundant and respondent could have bought "space" elsewhere to ship the cargo that was left behind, the difference between the price of the additional "space" it bought and the

contract price it paid for "space" on the Saigon Maru might have been adopted as the fair measure of damages. But the war had so disorganized shipping that there was practically no other "space" available. If we had got it we would have paid abnormal prices for it and would have thus penalized the owners of the Saigon Maru in an excessive amount of damages. We would have been liable to the charge that we did not keep our damages down to a minimum as obliged to do. We adopted instead a measure of damages which is not only much less in amount, but which is definite and certain. The profits that we have lost and our liability to Gillanders are amounts of exact calculation, and if these are taken as the measure of damages, justice will be done us and no injustice will be done the Saigon Maru or her owners.

Respondent claimed damages in the lower court as follows:

1. Loss of profits on 508,441 feet left behind, at \$7.955 per thousand—\$4,044.65.
2. Liability to Gillanders, £1,075 and 4,550 rupees, expressed in American dollars.

Judge Wolverton allowed

1. Loss of profits on 308,411 feet left behind at \$7.955 per thousand—\$2,453.65 (Ap. 910-11, 928).

2. Liability to Gillanders £1,075 at $\$3.48\frac{1}{4}$ each and 4,550 rupees at 31.85 cents, the rate of exchange at date of decree—\$5,192.86. (Ap. 928.)

I have already shown how we calculate the lost profits (Libelant's Exhibit "L," Ap. p. 123).

Gillanders' loss, claimed against respondent, is shown in the depositions of Clapham and Hunter (Ap. 670-707). In brief, these damages were made up as follows: The contract of sale was for 5,500 tons, ten per cent more or less. Deducting the ten per cent makes 4,950 tons, the minimum to be furnished. The ship carried only 4,550 tons. Consequently there was a shortage of 400 tons. The difference between the market price at Bombay on August second and the price at which Gillanders had bought the lumber was 2 pounds, 13 shillings, 9 pence per ton of 50 cubic feet. This amount, multiplied by the amount short (400 tons) equals £1,075. The additional claim of 4,550 rupees for failure to carry the long lengths is the lesser amount stated by Clapham and Hunter on this account. They estimate these damages at 1 to 2 rupees on the quantity delivered. We have used 1 rupee instead of 2 in making our calculation. The normal rate of exchange for a rupee is thirty-two cents.

At the time the court made its decree, the rate of exchange was $\$3.48\frac{1}{4}$ per pound sterling, and 31.85 cents per rupee, and that part of the decree covering

the Gillanders' claim was for \$5,192.86, being the equivalent of £1,075 and 4,550 rupees at these rates of exchange. If your Honors affirm the decree below, then the mandate should direct a new decree to be entered based on the rates of exchange prevailing when such new decree is entered, and if the parties cannot stipulate the amount, then testimony before the District Judge should be permitted on the subject. We also ask that interest be allowed us.

Now counsel complains of all these damages as "special" and not within the contemplation of the parties, and his complaints may be segregated thus:

1. The \$11.50 base price paid by respondent for the lumber was a *March* price, and was unknown to petitioners, and since it was lower than the *June* price, or the *August* price it is not fair to allow respondent to calculate his profits from it.

2. The charter was made several hours before the sale to Gillanders was consummated; consequently the charterers, while they knew of an intention to sell, did not know of an actual completed sale when they chartered the vessel and cannot be liable over for Gillanders' claim.

As to the first point: No one can read the correspondence between Mr. Wheelwright and Mr. Orrett leading up to the charter party without believing that Mr. Orrett knew or should have known that respondent was buying the lumber in March.

It is perfectly plain that Mr. Wheelwright was conducting a business transaction in three parts, each dependent on the others. He was:

1. Selling the lumber in Bombay if he could charter a ship to take it there.
2. Chartering a ship for Bombay if he could sell the lumber there.
3. Buying the lumber in Portland if he could get the ship and make the Bombay sale.

Anyone would have known that when he got the ship and made the sale (in March) he would immediately have to place his order at the mill so that the mill could begin to cut on the Adneci schedule (which had been furnished Orrett). Ap. p. 73.

What means Wheelwright's letter of March 9th to Orrett (Ap. 71) "we can supply a cargo at not more than two loading points on the Columbia-Willemette Rivers lay days *April 15th* or thereabouts," unless it means that he would have to order the lumber according to the Adneci schedule enclosed in the letter, as soon as the charter was signed? The mill couldn't get it out for April 15th unless it was ordered in March.

What does Orretts' telegram to respondent, March 13th (Ap. 74) "Bombay lumber *April-May* loading will take full cargo for Saigon * * * *lessen* long stuff as much as possible" mean? unless it means that he knew the cargo would be in process of cutting by the mill, and the lengths could there-

fore be lessened, and that the whole cut would have to be completed by April 15th?

See also Orretts' letter of March 19th (Ap. 77) "I ask that you restrict the lengths to a reasonable minimum."

Yet in the face of this counsel says in his brief, p. 98:

"The 'joker' in Mr. Wheelwright's statement (Libelant's Exhibit 'L,' Ap. 123) is this item: 'June 7th, Lumber 2,729,005 ft. @ \$11.50 base, less 21½ per cent twice, \$34,131.54.' When this statement was introduced in evidence nothing was said by the witness as to when this lumber was actually purchased. It was not until he was asked on cross examination the direct question as to when he bought the lumber that it was disclosed that the purchase price had been fixed by a sale contract made in the preceding March."

In view of the correspondence I have referred to above, think of accusing Mr. Wheelwright of leaving it to be inferred that the purchase was made about the 4th of June. As a matter of fact the ship *commenced loading May 26th* and sailed on June 4th.

But all this is of little consequence, for it is not at all necessary for the collection of these damages that petitioners should have known just when re-

spondent bought this cargo, or what he paid for it. It is enough that he knew that Mr. Wheelwright had chartered this ship for the express purpose of fulfilling this sale in Bombay, and was likely to lose his profits and render himself liable to his purchaser if the ship failed him. It is not necessary that petitioner should have known the details of the transaction or just what the profits would be. That is carrying the rule in Hadley against Baxendale entirely too far. It is a common sense rule—not an antique formula designed to thwart justice. Counsel himself states it on page 192 of his brief as follows:

“The damages recoverable in such cases are such as may fairly and reasonably be considered either as arising naturally from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.”

I have no quarrel with that, nor with the further statement of the rule by counsel—it being merely an additional exposition of the part I have quoted. I adopt his own words—such damages “as may *reasonably be supposed* to have been in the contemplation of both parties at the time they made the contract,” and ask your Honors whether you can read the correspondence between Wheelwright and Orrett leading up to the charter party (Ap. pp.

69-82) without saying that Orrett knew Wheelwright was selling the lumber if he could get the ship, and was chartering the ship if he could sell the lumber, and that each transaction was absolutely dependent on the other, and that the moment he closed those two he had to buy the lumber in Portland so the mill could commence cutting? Though as to that latter fact, I don't think it important whether Orrett knew it or not. In fact we don't have to prove that Orrett *knew* anything. It is enough if we prove that he must, when he made the charter party, be "*reasonably supposed*" to have had in contemplation that Wheelwright was chartering the ship to fulfill a sale of lumber which he was then making in Bombay, and that if the ship failed, Wheelwright would lose his profits and be liable to his purchaser for breach of the contract of sale. That is all Orrett need be reasonably supposed to have had in contemplation. He need not know the exact amount of profits, nor when Wheelwright bought the lumber, nor what he paid for it, nor what he sold it for, nor how much he would owe Gillanders as a result of a breach. That, as I said, would be carrying the rule beyond common sense.

As to the second point—that the sale to Gillanders was not consummated till several hours after the charter party—I feel I have already answered that in what I have just written. For whichever was completed first, is there any doubt as to what damages Orrett must have had in mind

as likely to flow from a breach? Your Honors are not going to make the law so absurd as to say that Orrett can lead Wheelwright into this venture (remember it was Orrett who opened the negotiations by his telegram, "Have you any inquiries or do you know of any offers for lumber for Bombay; subject to proper inducements we might put boat on berth May loading" Ap. 69), and get Wheelwright to sell the lumber in Bombay and charter the ship to carry it there, and then, having been kept fully informed throughout the whole negotiations of the special purpose for which the ship was wanted, escape the damages because the final closing of the sale was some hours after the final closing of the charter. The law is not an absurd science, nor, with all its technicality, so hairsplitting as that. Its aim is justice.

I don't care anything about it, but it may be remarked in passing that as a matter of fact the sale of lumber was closed before the ship charter. Mr. Wheelwright in one place states the contrary, but his later testimony, when he had the actual cables before him, was that the sale was closed first—by his cable using code word meaning "we conform to contents," etc. (Ap. pp. 336-339, especially 338, 339.) This shows that the sale was consummated March 17th. The charter party was not finally closed on that day because some details still remained unsettled. It appears to have been finally closed March 20th. (Ap. 344-346.) It bears date March 19th (Ap. 976).

ARE THESE DAMAGES SPECIAL?

The rule against special damages, unless they were in the contemplation of the parties refers to damages that are *extra* and exceptional, and in *addition* to the general damages. The rule has its foundation in the just thought that it is not fair to tie a man up in a contract, and then hold him for extra and unusual damages growing out of exceptional circumstances, which, had he known them, would have prevented him from entering into the contract, or, at least from entering into it without an increased consideration to compensate him for the extra risk.

But the whole reason for the rule fails, when, as in this case, the damages, though "special" in that they represent lost profits, etc., are really *less* than the general damages would have been, and are substituted for the general damages.

As I have said before, the owners of the Saigon sold to the respondent "transportation" to Bombay—they sold "space" in their vessel. In normal times there is a known market value for "space," and ordinarily the measure of damages would have been the extra amount it would have cost respondent to go out in the market and buy "transportation" or "space" for the left-behind cargo. If respondent could have got it transported on another vessel, at the same rate, to arrive at Bombay at the same time, there would have been no damage; if at a higher rate, then the amount of the excess would be the damage. But, as Mr. Wheelwright explained

(Ap. 127-128), these were war times, ships were scarce, "space" was unobtainable. Even if it could have been bought at all, the extra cost would have been at least \$15,000.00. But it could not be had. Instead of claiming \$15,000.00, we have minimized our damages, which, though *called* "special" are less in amount than general damages would have been. Hence, any rule against "special" or "exceptional" damages becomes here immaterial.

In this connection let me call attention to a case mentioned by Judge Wolverton in his opinion (Ap. p. 908)—*Strom Bruks Aktie Bolag v. Hutchison*, Aspinwalls' Reports, Vol. 10, N. S., pp. 136, 140-141. In this case the owners of a vessel did not furnish it as agreed and the charterers, who had sold the cargo to a third person, paid that third person the damages for non-delivery of the cargo and sued the owners of the ship to recover. On the contention of the defendants that the damages were special and should not be allowed, the court said:

"It seems to me that this argument is really founded on an inaccurate use, or perhaps I should say a less accurate application of the terms 'special damages' and 'general damages.' That division of damages is more appropriate, I think, to cases of tort than to cases of contract. 'General damages,' as I understand the term, are such as the law will presume to be the direct natural or probable consequence of the

act complained of. 'Special damages,' on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, and therefore they must be claimed specially and proved strictly. In cases of contract special or exceptional damages cannot be claimed unless such damages were within the contemplation of both parties at the time of the contract. Now, the appellants are not claiming here exceptional damages. They are claiming nothing but ordinary damages ascertained and limited by the special circumstances of the case. No doubt they are claiming over against the respondents the damages which they have had to pay to Thomas Owen and Co. But if there had been no contract at all between the appellants and Thomas Owen and Co., and Thomas Owen and Co. had made a similar contract with some third person who failed to perform his bargain, and Thomas Owen and Co. had bought against that third person just as they did against appellants, their purchases would have been the best evidence possible of the measure of damages resulting from the respondents' breach of contract. I am unable to see what difference it can make whether you claim damages generally and show that an award of general damages would include and cover a special loss for which you seek relief or whether you seek compensation for a special

loss and show that the loss would be more than covered or compensated by an award of general damages." (Ap. pp. 140-141.)

APPELLANT'S OBJECTION THAT RESPONDENT HAS NOT PAID GILLANDERS.

Counsel for the Saigon takes the position that respondent was not entitled to recover damages on account of its liability to Gillanders, Arbuthnot & Company since it had not actually paid Gillanders, Arbuthnot & Company and satisfied that liability. It makes no difference in law whether respondent had paid Gillanders, Arbuthnot & Company or not. The respondent, as stated by Mr. Wheelwright on the stand (Ap. 350), recognized the liability and if, on account of the business dealings between Gillanders and respondent and the friendly relationship existing between them, or from whatever cause the Gillanders firm allowed respondent to postpone until the trial of this case payment of Gillanders' damages, it is no affair of the Saigon Maru.

An illustration of this is the case of *Cobb v. Illinois Central Railroad Company*, 38 Iowa, 601, which was an action brought to recover on account of the failure of the railroad to carry a large quantity of oats from Dubuque and other points to Cairo. The plaintiffs were engaged in the business of supplying forage for the United States armies during the Civil War. The court stated "the measure of damages against a carrier for violation of his duty or contract in respect to the transportation of property should be such as to do justice and award full

compensation, and no more, to the party injured. Plaintiffs must be compensated for the profit they would have realized, which is the difference between the price they paid, or contracted to pay for the oats, and the price under their contract with the government, less the freight to Cairo. They must also recover for the sum they paid *or are liable to pay* for the oats purchased by them or agreed to be delivered by the various parties with whom they contracted. If the oats were actually received by them, or were not, and only contracted to be delivered, in either case they must recover for the sums paid by them on account of the oats, *or on account of their liability upon their several contracts to purchase oats*. They must be made whole on account of these outlays, and also, as we have seen, must recover the profits that would have accrued to them." And the court allowed interest on these various sums.

Respectfully submitted,

ERSKINE WOOD,

Proctor for Respondent.

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IN THE
SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1921.

OSAKA SHOSEN KAISHA, a Corporation,
and UNITED STATES FIDELITY &
GUARANTY COMPANY, a Corpora-
tion,

Petitioners,

vs.

PACIFIC EXPORT LUMBER COMPANY, a
Corporation,

Respondent.

No. 129

ON PETITION FOR WRIT OF CERTIORARI TO
THE CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS REPLY BRIEF

Petitioners, in their original brief, have anticipated nearly all the points and authorities advanced and cited by respondent. We shall, however, add a few words in reply.

CLAIM OF GENERAL ADMIRALTY LIEN

On pages 2 and 3 of its brief, respondent questions the findings of the District Court and of the

Circuit Court of Appeals that the "lumber" the "Saigon Maru" refused to carry had not been sawed—had no physical existence—and asks that the evidence in support of this finding be pointed out.

On pages 436 and 437 of the Apostles, appears part of the cross-examination of Mr. Wheelwright, respondent's general manager, as follows:

"Q. This Inman-Poulsen Lumber Company is the concern that cuts your lumber for you? A. We buy of them and also of other mills. They furnished that particular cargo.

Q. I mean this cargo you bought of them? A. Yes.

Q. They cut it? A. Yes.

* * * * *

Q. Well, what part were they going to cut for this ship, that the ship didn't take? A. What part?

Q. Yes. Would they cut right up to the last? A. Well, when the ship approaches completion, they look out and cut what she requires.

Q. That would be the long pieces then? A. *Well, I guess they thought the way we did, that if she fell short on her deck load, as the captain threatened to do from the start, that the long pieces would not go, so they did not cut them presumably.*"

And, further bearing on this point, Mr. Orrett, claimant's agent, wrote Mr. Wheelwright on May 23, 1917, about the time the "Saigon Maru" left Tacoma for Portland, as follows:

"My Dear Mr. Wheelwright:

"This will introduce to you Captain Y. Yano, who

represents this Company as Port Captain. I have instructed him to proceed to Portland with S. S. *Saigon Maru*, and to remain with the steamer as long as is necessary to superintend and help, so far as possible, with the loading. Captain Yano is fully advised as to my wishes, especially with regard to the amount of deck cargo to be carried.

"At the present time, the Captain of the steamer asks that only about 175,000 feet B. M. shall be loaded as deck cargo. This, I believe, would be too small a quantity, and I will leave it to you and the stevedores to try and convince Captain Yamamoto otherwise.

"Any attention that you are pleased to show Captain Yano, while at your port, will be highly appreciated by me." (Ap. 87-88.)

Three days afterward, upon the arrival of the *Saigon Maru* at Portland to take on cargo, Mr. Wheelwright addressed a letter under the date of May 26, 1917, to Captain Yamamoto, the master of the "*Saigon Maru*," from which we make the following excerpt:

"A large portion of the cargo is ready, but the balance will have to be sawed, and in order that we may suit the quantity to what the steamer is going to carry, we will thank you to inform us, after consulting the marine surveyor, of approximate quantity of proposed deck load." (Libelant's Exhibit "U," Ap. 1002-3.)

Authorities.

We have anticipated and considered on pages 40 to

52 of our original brief all of the cases cited on pages 8 to 18 of respondent's brief on the subject of its right to a lien under the general admiralty law, with the exception of *The Missouri*, 30 Fed. 384, *The Guilio*, 34 Fed. 909, and *The Margaretha*, 167 Fed. 794.

In the first of these cases, it was held that the libelant (shipper) had no lien against the ship because none of his goods had ever been placed in the ship's possession. In the second, there was an original libel and two or more cross-libels. The original libel was against 1940 Bales of Vegetable Hair. It does not appear, as to either of the cross-libels, whether it was *in rem* or *in personam*. However, the court held (p. 912) that "the evidence does not show that the bark did not take a full cargo." There was, therefore, no occasion to discuss further that feature of the case. In the third case, *The Margaretha*, there was a charter party under which nothing was done, and, quite naturally, the court held there was no lien.

So far as these cases are in point, they merely serve to support the position of the petitioners. In fact, none of the cases cited by respondent or the courts below give any support to the doctrine of part performance as contended for by respondent. It is only by extracting from the *obiter* parts of opinions rendered in cases in which liens against vessels have been *denied*, words and phrases which, at the very best, are ambiguous that any foundation can be furnished for respondent's doctrine.

Counsel contends, however, that there is really no "lack of reciprocity" in this case—that the charter party provides that "the vessel is to have a lien on cargo for all freight, dead freight and demurrage."

We submit that the quoted clause provides for a lien only upon lumber actually placed in the ship's possession and, such being the case, it is difficult to see how there is established by this clause a reciprocal right of lien as between the vessel and the unshipped, unsawn "lumber," which is the only lumber to which this suit relates.

MEASURE OF DAMAGES

We have shown on pages 94-95 of our original brief that, under the general rule, the measure of damages in cases of this kind is the difference between the market value of the goods at the place of destination at the time when by the contract they should have arrived there, minus their value at the place of shipment at said time, with the agreed freight and other expenses necessary to get the goods to destination added, and that the alleged liability to Gillanders, Arbuthnot & Company is not a recoverable item of damage on the ground that it is too remote, speculative and contingent and not within the contemplation of the parties at the time the charter party contract was made. In support of this contention we have cited the decision of this Honorable Court in the case of

Globe Refining Company vs. Landa Cotton Oil Company, 190 U. S. 540; 47 L. Ed. (U. S.) p. 1174, first column.

In that case, a sale contract was involved, but the court based its decision principally upon three English cases, in each of which the relation of the parties was that of shipper and carrier. The rule declared by this court was as follows:

"It may be said with safety that mere notice to a seller of some interest or probable action of the buyer is not enough, necessarily and as a matter of law, to charge the seller with special damages on that account if he fails to deliver the goods."

From one of these English cases cited by this Honorable Court we excerpt the following:

"There must, if it be sought to charge the carrier with consequences so onerous, be distinct evidence that he had notice of the facts and assented to accept the contract upon those terms."

Horne vs. Midland R. Co., L. R. 7 C. P. 583

Counsel and the courts below have refrained from applying to this feature of the case the rule of damages declared by the courts of the United States, apparently preferring the doctrine of the English case of *Strom Bruks Aktie Bolag vs. The Hutchison*, Aspinwalls' Reports, Vol. 10, N. S., pp. 136, 140-141.

That case came on appeal to the House of Lords from one of the divisions of the Court of Session of Scotland. There were two opinions,—one by Lord Macnaghten and the other by Lord Davy. The shipowner in that case had contracted to transport the goods in question from Stackna, Sweden, to Cardiff, and the shipper had contracted to sell the goods to a third party. The goods not arriving in time, the

purchaser of them bought against his contract with the shipper and claimed on the shipper for the difference between what he had to pay for the other goods and the contract price. The shipper paid the claim and, in turn, billed on the shipowner for the amount. This not being paid, the shipper sued the shipowner.

While there are some remarks in each of the two opinions which lend support to the claim that the court held that the shipper's liability under the sale contract was a proper item of damages in a suit against the shipowner, yet a careful reading of the two opinions discloses the fact that both adopted the general rule for the measurement of damages for which we are here contending. Lord Macnaghten quoted and approved the following rule:

"Setting aside all special damages, the natural and fair measure of damages is the value of the goods at the place and time at which they ought to have been delivered to the owner."

And he then said:

"The appellants' claim is made on that footing. All they want is to be protected against loss. They claim for the *extra cost of supply at the stipulated time and at the agreed place of delivery*, goods as nearly as possible of the same description as those which the respondents had undertaken to deliver. The appellants * * do not claim profits."

Lord Macnaghten also said:

"There seems to have been no market for the wood pulp at Cardiff,"

and the shipper was compelled to purchase in Manchester, Liverpool and London.

Adverting to the fact that no other transportation was available at the time, he further said that, if such transportation had been available, the measure of damages would have been merely the difference between the contract freight and the freight actually paid.

Lord Davy, in course of his opinion, says:

"I am of the opinion that the proper measure of damages would have been the *cost of replacing the goods* at their place of destination at the time when they ought to have arrived, less the value of the goods in Sweden and the amount of the freight and insurance. There was evidence that it was practically impossible to obtain another vessel to take the goods from Stackna at that time of the year, and I think, therefore, that appellants were justified in buying in or (which is the same thing for the purpose) allowing their purchasers to buy in as soon as it was apparent * * * that respondents could not perform their contract. And I think that the actual purchases made might properly be taken as *evidence of the cost of replacing the goods in Cardiff.*"

From the foregoing it is plainly apparent that the amount of the liability of the shipper to his purchaser was employed only as a means of measuring the damages—only as the best *evidence* before the court of the amount required to replace the goods at the time and place agreed for their delivery.

In that case, there is a discussion of the question of what are general and what are special damages, and a statement to the effect that, in suits upon contract, there is no such thing as "special damages." Possibly, this is good British doctrine, but it is not the doctrine of this court, as is shown in the case of the *Globe Refining Co. vs. Landa Cotton Oil Co.*, *supra*, where this court uses the term "special damages" with reference to an action upon contract.

The fact that the three English cases cited and approved in the above case of *Globe Refining Co. vs. Landa Cotton Oil Co.* declare a rule which is directly opposed to the doctrine of the *Strom Bruks* case as construed by counsel indicates very strongly that his construction is erroneous.

While the *general* rule for the measurement of a shipper's damage in case of the shipowner's refusal to carry as agreed is as above indicated and as stated on page 94 of our original brief, it is not to be overlooked that the lumber in question had been sold at destination *below* the market price prevailing there at the time of the ship's arrival. Such being the case, the rule stated by us on page 97 of said brief applies and such sale price becomes the minuend to be employed in ascertaining the damages.

The most serious objection, however, to the Court's method of measuring the damages is not in the minuend, but in the subtrahend employed—in calculating the damages on the basis of the March purchase price

instead of the August market price. (Petitioners
Brief, pp. 91-2.)

Respectfully submitted,

FRANK ADAMS HUFFER
WILLIAM H. HAYDEN and
GERALD H. BUCEY
Counsel for Petitioners.

**OSAKA SHOSEN KAISHA ET AL. v. PACIFIC
EXPORT LUMBER COMPANY.**

**CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT.**

No. 129. Submitted November 23, 1922.—Decided January 2, 1923.

1. Whether the ship is subject to a lien to secure damages resulting from breach of a maritime affreightment contract, is a question of maritime law not controllable by a state statute. P. 495.
 2. Acceptance of part of the designated cargo under a contract of affreightment creates no lien upon the ship for damages resulting from refusal to take all. P. 495.
 3. The maritime lien or privilege adhering to a vessel is a secret one which may operate to the prejudice of general creditors and purchasers without notice, and is therefore *stricti juris*, not to be extended by construction, analogy, or inference. P. 499.
 4. The lien, created by law, presupposes mutuality and reciprocity as between ship and cargo. P. 499.
- 272 Fed. 799, reversed.

CERTIORARI to a decree of the Circuit Court of Appeals, affirming a decree of the District Court for the libellant (the present respondent) in a proceeding *in rem* to enforce a claim of maritime lien.

Mr. William H. Hayden for petitioners. Mr. Frank Adams Huffer and Mr. Gerald H. Bucey were also on the briefs.

Mr. Erskine Wood for respondent.

The moment a ship enters upon the performance of her charter by taking even a small part of the cargo on board, she binds herself to the performance of her contract just as if she were a living being. Her taking on part of the cargo is her signature to the contract, so that whereas prior to that act, only her owner was liable *in personam*, after that act she herself becomes liable *in rem*; in other words, a maritime lien in favor of the charterer has arisen against her.

Our opponents, building up their case on the maxim that the ship is bound to the cargo and the cargo to the ship, say that it is impossible there should be a lien on the Saigon for leaving part of the lumber behind, because the ship had no lien on this left-behind cargo, and that unless there is such reciprocity of liens there can be no lien at all.

The point is an interesting one that has never been passed upon by this Court, though we think the current of authority as it may be followed through the history of maritime law is in our favor. *Consolato de la Mer*, c. 209; *Benedict*, 4th ed., § 131; *Marine Ordinances*, Louis XIV, "Maritime Contracts," § XI, Tit. I.

We concede that the old continental maritime law that a ship was liable for breach of an executory contract of affreightment, has been modified in this country to the extent that she is no longer liable *in rem* when the contract remains wholly executory. But, we contend, that is the extent of the modification; and where a ship partly

executes the contract, as by taking on part of her cargo, she herself is liable for all breaches of the contract. The argument on this point may be summarized thus:

1. Under the old continental codes ships were liable *in rem* for breaches of contracts made by the managing owner on their behalf, including executory contracts of affreightment.

2. Even if this were not true, such was certainly the law of this country as announced in the earlier decisions of our admiralty courts, up to the time of *The Freeman*, 18 How. 182, and *The Yankee Blade*, 19 How. 82.

3. *The Yankee Blade* and *The Freeman* did not really settle the point, but they did contain *dicta* that a vessel was not liable for breach of a contract of affreightment which was purely executory.

4. In deference to these *dicta* the lower courts have decided that purely executory contracts do not bind the vessel.

5. But this is the limit of the extent to which the old law has been modified, and the lower courts, as if jealous to preserve that old law, in so far as the *dicta* will allow, have many times held that where the vessel partly executes the contract, as by taking on part of the cargo, she herself becomes liable *in rem* for all breaches of the contract.

6. The statement by counsel that the liens must be reciprocal, that the ship is bound to the cargo and the cargo to the ship, relates to the case where the cargo has been delivered to the ship, and is true so far as it goes. But it in no way contradicts the theory that the lien on the ship may go further. It is in no way inconsistent with the theory that she is liable for breaches of her partly executed contracts, even where she has no corresponding lien in return. There are many cases of liens on ships with no reciprocal lien in their favor. As witness breach of her contract to carry a passenger. *The Rebecca*, 1

Ware, 188; *The Paragon*, Fed. Cas. No. 10,708; *The Tribune*, 3 Sumner, 144; *The Flash*, 1 Abb. Adm. 67; *The Pacific*, 1 Blatchf. 569; *Oakes v. Richardson*, 2 Lowell, 173; *The Williams*, 1 Brown Adm. Rep. 208; *The Hermitage*, 4 Blatchf. 474; *The Ira Chaffee*, 2 Fed. 401; *The Monte A*, 12 Fed. 331; *The J. F. Warner*, 22 Fed. 342; *The Director*, 26 Fed. 708; *The Missouri*, 30 Fed. 384; *The Giulio*, 34 Fed. 909; *The Starlight*, 42 Fed. 167; *The Oscoda*, 66 Fed. 347; *The Eugene*, 83 Fed. 222; 87 Fed. 1001; *The Helios*, 108 Fed. 279; *The Oceano*, 148 Fed. 131; *The Margaretha*, 167 Fed. 794; *Wilson v. Peninsula Bark & Lumber Co.*, 188 Fed. 52; *The Thomas P. Sheldon*, 118 Fed. 945; *The S. L. Watson*, 118 Fed. 952; *Stone v. The Relanpage*, Fed. Cas. No. 13,486.

It is to be noted, in considering this reciprocal relation of liens, that the lien of a vessel on her cargo is of an entirely different nature and origin from the lien of the cargo on the vessel. The lien of the cargo on the vessel is of a higher order. It is a *jus in re* and follows the ship into whosoever hands the ship goes. The lien on the cargo, upon the other hand, is not a *jus in re* but a mere possessory lien and is lost the moment the cargo leaves her possession. The lien on the cargo is nothing more than the right to hold the goods until the freight is paid.

It is hardly necessary to point out that where a vessel enters upon the performance of her contract of affreightment by actually taking on a portion of her cargo, she has signified by as definite and conspicuous an act as it is possible for her to perform that she is undertaking a contract and is herself bound for its performance. You could hardly have a more definite rule or test than that. And the lien arising would be no more "secret" than a lien for seamen's wages, salvage, general average, collision, materials, supplies, repairs, necessities, bottomry loans, pilotage, wharfage, or any other of the liens which a ship's activities may give rise to.

It would surely be a great miscarriage of justice to allow this Saigon Maru, after deliberately refusing to receive part of the cargo, to then say that we had no lien on her because she had no lien on that part of the cargo which she herself had wrongfully refused. This would be to permit her to profit by her own wrong. We can see no more reason for denying the lien under the state statute in this case, on the ground of lack of uniformity, than for denying it in those quite numerous death cases where the state statutes have been invoked to give a lien where the maritime law gave none.

[Argument was made on the construction as well as the applicability of the statute; the amount of deckload; the seaworthiness of the vessel; and the measure of damages.]

MR. JUSTICE McREYNOLDS delivered the opinion of the Court.

March 19, 1917, through its agent at Tacoma, Wash., Osaka Shosen Kaisha, incorporated under the laws of Japan and owner of the Japanese steamer "Saigon Maru," then at Singapore, chartered the whole of that vessel, including her deck, to respondent Lumber Company to carry a full cargo of lumber from the Columbia or Willamette River to Bombay. In May, 1917, the vessel began to load at Portland, Ore. Having taken on a full under-deck cargo and 241,559 feet upon the deck, the captain refused to accept more. After insisting that the vessel was not loaded to capacity and ineffectively demanding that she receive an additional 508,441 feet, respondent libeled her, setting up the charter party and the captain's refusal, and claimed substantial damages. The owner gave bond; the vessel departed and safely delivered her cargo.

The Lumber Company maintains that it suffered material loss by the ship's refusal to accept a full load; that

she is liable therefor under the general admiralty law and also under the Oregon statute (Olson's Laws of Oregon, § 10,281), which declares every vessel navigating the waters of the State shall be subject to a lien for the damages resulting from non-performance of affreightment contracts.

Petitioner excepted to the libel upon the ground that the facts alleged showed no lien or right to proceed *in rem*. The trial court ruled otherwise and awarded damages upon the evidence. 267 Fed. 881. The Circuit Court of Appeals approved this action. 272 Fed. 799.

Little need be written of the claim under the state statute. The rights and liabilities of the parties depend upon general rules of maritime law not subject to material alterations by state enactments. *The Roanoke*, 189 U. S. 185; *Southern Pacific Co. v. Jensen*, 244 U. S. 205; *Union Fish Co. v. Erickson*, 248 U. S. 308.

Both courts below acted upon the view that while the ship is not liable *in rem* for breaches of an affreightment contract so long as it remains wholly executory, she becomes liable therefor whenever she partly executes it, as by taking on board some part of the cargo. In support of this view, it is said: Early decisions of our circuit and district courts held that under maritime law the ship is liable *in rem* for any breach of a contract of affreightment with owner or master. That *The Freeman* (1856), 18 How. 182, 188, and *The Yankee Blade* (1857), 19 How. 82, 89, 90, 91, modified this doctrine by denying such liability where the contract remains purely executory, but left it in full force where the vessel has partly performed the agreement, as by accepting part of the indicated cargo. *The Hermitage*, 12 Fed. Cas. No. 6410; *The Williams*, 29 Fed. Cas. No. 17,710; *The Ira Chaffee*, 2 Fed. 401; *The Director*, 26 Fed. 708; *The Starlight*, 42 Fed. 167; *The Oscoda*, 66 Fed. 347; *The Helios*, 108 Fed. 279; *The Oceano*, 148 Fed. 131; *Wilson v. Peninsula Bark & Lumber Co.*, 188 Fed. 52, were cited.

We think the argument is unsound.

Prior to *The Freeman* and *The Yankee Blade*, this Court had expressed no opinion on the subject; but, so far as the reports show, the lower courts had generally asserted liability of the ship for breaches of affreightment contracts. "It is grounded upon the authority of the master to contract for the employment of the vessel, and upon the general doctrine of the maritime law, that the vessel is bodily answerable for such contracts of the master made for her benefit." *The Flash*, 1 Abb. Adm. 67, 70; *The Rebecca*, 1 Ware, 188; *The Ira Chaffee*, *supra*. Since 1857, some of the lower courts have said that the ship becomes liable for breaches of affreightment contracts with her owner or master whenever partly executed by her; but it is forcibly maintained that in none of the cases was the point directly involved. *The Hermitage*, *The Williams*, *The Ira Chaffee*, *The Director*, *The Starlight*, *The Oscoda*, *The Helios*, *The Oceano*, *Wilson v. Peninsula Bark & Lumber Co.*, *supra*.

The Freeman and *The Yankee Blade* distinctly rejected the theory of the earlier opinions. They are inconsistent with the doctrine that partial performance may create a privilege or lien upon the vessel. And in so far as the lower courts express approval of this doctrine in their more recent opinions, they fail properly to interpret what has been said here.

While, perhaps, not essential to the decision, this Court, through Mr. Justice Curtis, said in *The Freeman*: "Under the maritime law of the United States the vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment; but the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it."

In *The Yankee Blade*, Mr. Justice Grier, speaking for the Court, declared:

"The maritime 'privilege' or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a '*jus in re*,' without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding *in rem*. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the State courts, though by analogy loosely termed proceedings *in rem*, are evidently not within the category. But this privilege or lien, though adhering to the vessel, is a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is therefore '*stricti juris*,' and cannot be extended by construction, analogy, or inference. 'Analogy,' says Pardessus, (*Droit Civ.*, vol. 3, 597,) 'cannot afford a decisive argument, because privileges are of *strict right*. They are an exception to the rule by which all creditors have equal rights in the property of their debtor, and an exception should be declared and described in express words; we cannot arrive at it by reasoning from one case to another.'

"Now, it is a doctrine not to be found in any treatise on maritime law, that every contract by the owner or master of a vessel, for the future employment of it, hypothecates the vessel for its performance. This lien or privilege is founded on the rule of maritime law as stated by Cleirac, (597:) '*Le batel est obligée à la marchandise et la marchandise au batel*.' The obligation is mutual and reciprocal. The merchandise is bound or hypothecated to the vessel for freight and charges, (unless released by the covenants of the charter-party,) and the vessel to the cargo. The bill of lading usually sets forth the terms of the contract, and shows the duty assumed by the vessel. Where there is a charter-party, its

covenants will define the duties imposed on the ship. Hence it is said, (1 Valin, Ordon. de Mar., b. 3, tit. 1, art. 11,) that 'the ship, with her tackle, the freight, and the cargo, are respectively bound (affectée) by the covenants of the charter-party.' But this duty of the vessel, to the performance of which the law binds her by hypothecation, is to deliver the cargo at the time and place stipulated in the bill of lading or charter-party, without injury or deterioration. If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the non-delivery, in good order, of goods never received on board. Consequently, if the master or owner refuses to perform his contract, or for any other reason the ship does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or maritime lien on the ship for such breach of the contract by the owners, but must resort to his personal action for damages, as in other cases. . . .

"And this court has decided, in the case of *The Schooner Freeman v. Buckingham*, 18 Howard, 188, 'that the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it.'"

In *Bulkley, Claimant of the Barque Edwin, v. Naumkeag Steam Cotton Co.*, 24 How. 386, 393, the barque was libeled to recover damages for not delivering part of the cotton—707 bales—which the master had agreed to carry from Mobile to Boston. With most of the cargo on board the vessel was towed below the bar, there to receive the remainder from lighters. A lighter carrying 100 bales sank, and the cotton was lost or damaged. The barque delivered 607 bales at Boston in good condition. The owner of the vessel claimed exemption for her upon the ground that she never received the 100 bales. This Court said: "In the present case the cargo was delivered

in pursuance of the contract, the goods in the custody of the master, and subject to his lien for freight, as effectually as if they had been upon the deck of the ship, the contract confessedly binding both the owner and the shipper; and, unless it be held that the latter is entitled to his lien upon the vessel also, he is deprived of one of the privileges of the contract, when, at the same time, the owner is in the full enjoyment of all those belonging to his side of it."

Later opinions approve the same general rule.

"The doctrine that the obligation between ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board, or in the custody of the master, has been so often discussed and so long settled, that it would be useless labor to restate it, or the principles which lie at its foundation. The case of the *Schooner Freeman v. Buckingham*, decided by this court, is decisive of this case." *The Lady Franklin*, 8 Wall. 325, 329.

"It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master; but the law creates no lien on a vessel as a security for the performance of a contract to transport a cargo until some lawful contract of affreightment is made, and the cargo to which it relates has been delivered to the custody of the master or some one authorized to receive it." *The Keokuk*, 9 Wall. 517, 519.

The maritime privilege or lien, though adhering to the vessel, is a secret one which may operate to the prejudice of general creditors and purchasers without notice and is therefore *stricti juris* and cannot be extended by construction, analogy or inference. *The Yankee Blade*, *supra*. The contract of affreightment itself creates no lien, and this Court has consistently declared that the obligation between ship and cargo is mutual and reciprocal and does not attach until the cargo is on board or in

the master's custody. We think the lien created by the law must be mutual and reciprocal; the lien of the cargo owner upon the ship is limited by the corresponding and reciprocal rights of the ship owner upon the cargo. See *The Thomas P. Sheldon*, 113 Fed. 779, 782, 783.

The theory that partial acceptance of the designated cargo under a contract of affreightment creates a privilege or lien upon the ship for damages resulting from failure to take all, is inconsistent with the opinions of this Court and, we think, without support of adequate authority. In *The S. L. Watson*, 118 Fed. 945, 952, the court well said:

"The rule of admiralty, as always stated, is that the cargo is bound to the ship and the ship to the cargo. Whatever cases may have been decided otherwise disregarded the universal fact that no lien arises in admiralty except in connection with some visible occurrence relating to the vessel or cargo or to a person injured. This is necessary in order that innocent parties dealing with vessels may not be the losers by secret liens, the existence of which they have no possibility of detecting by any relation to any visible fact. It is in harmony with this rule that no lien lies in behalf of a vessel against her cargo for dead freight, or against a vessel for supplies contracted for, but not actually put aboard. *The Kiersage*, 2 Curt. 421, Fed. Cas. No. 7,762; Pars. Ship. & Adm. (1869), 142, 143. It follows out the same principle that Mr. Justice Curtis states in *The Kiersage*, 2 Curt. 424, Fed. Cas. No. 7,762, that admiralty liens are *stricti juris*, and that they cannot be extended argumentatively, or by analogy or inference. He says, 'They must be given by the law itself, and the case must be found described in the law.'"

Reversed.